(33,976, 33,977)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 667

WILLIAM ROSCHEN, APPELLANT,

vs.

HAMILTON WARD, ATTORNEY GENERAL OF THE STATE OF NEW YORK; JOAB H. BANTON, DISTRICT ATTORNEY OF NEW YORK COUNTY, NEW YORK, AND WILLISTON W. BISSELL ET AL., ETC.

No. 668

S. S. KRESGE COMPANY, APPELLANT,

vs.

HAMILTON WARD, ATTORNEY GENERAL OF THE STATE OF NEW YORK; JOAB H. BANTON, DISTRICT ATTORNEY OF NEW YORK COUNTY, NEW YORK, AND WILLISTON W. BISSELL ET AL., ETC.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

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IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

WILLIAM ROSCHEN, Plaintiff,

against

ALBERT OTTINGER, Attorney General of the State of New York; Joab H. Banton, District Attorney of New York County, New York, and Williston W. Bissell, Harlow M. Fuller, Thomas McBurnie, William L. Cook, and Frederic A. Woll, Constituting the Board of Optometry Examiners of the State of New York, Defendants

In Equity. No. 46211

AMENDED COMPLAINT

William Roschen, as plaintiff, brings this his amended bill of complaint against the defendants above named, and each of them, and complains as follows:

1. Plaintiff is a citizen of the United States of America, over the age of 21 years, and resides in the City, County and State of New York.

2. Albert Ottinger is the Attorney General of the State of New York, and Joab H. Banton is the District Attorney of the County of New York, State of New York, and said defendants in their respective capacities named are holding office under and by virtue of the laws of New York.

3. The defendants Williston W. Bissell, Harlow M. Fuller, Thomas McBurnie, William L. Cook and Frederic A. Woll constitute The Board of Optometry Examiners of [fol. 4] State of New York.

4. Plaintiff is a registered pharmacist under the laws of New York, and has for 28 years operated a pharmacy at No. 301 Third Avenue, in the Borough of Manhattan, New York City, known as Sultan's Pharmacy. Plaintiff purchased said Sultan's Pharmacy from one Edward J. Sultan in or about the year 1900, and plaintiff has filed a certificate with the Clerk of the County of New York, under the laws of New York, showing that he is operating the said

pharmacy under the name of said Sultan's Pharmacy. Said certificate was filed on the 10th day of October, 1916.

5. For the last 8 years, plaintiff has maintained in said drug store a counter at which plaintiff sells spectacles. Spectacles are from time to time displayed in plaintiff's windows and they are displayed on the counter and on glass shelves under the counter. During said 8 years many customers have come in and purchased spectacles from the plaintiff or from his clerks. Neither the plaintiff nor his clerks has ever examined the eyes of a customer, prescribed treatment for any customers, nor diagnosed any customer's difficulties. Customers wishing to purchase spectacles are handed a case containing 18 pairs of spectacles and they are handed a printed card, which is on the counter and which contains printed matter in various sizes of type. Customers purchasing spectacles in the plaintiff's store, se- [fol. 5] lect the spectacles which they consider help their vision the most, without assistance, aid or suggestion from the plaintiff or any of plaintiff's employees. At no time has any customer ever returned to plaintiff's shop and complained that the spectacles bought from plaintiff did not help him, did not fit him or in any way complained of the purchase of spectacles made from plaintiff.

6. Plaintiff sells in each year substantial quantities of spectacles and makes a substantial profit directly from such sales, and the fact that plaintiff has spectacles for sale brings customers into his store who purchase other articles in addition to spectacles and thus plaintiff realizes indirectly a further profit from his spectacle business. The matter in controversy in this suit is the plaintiff's spectacle business, and the value thereof exceeds $3,000, exclusive of interest and costs.

7. All of the spectacles sold by plaintiff contain so-called convex spherical lenses, that is, lenses that are merely convex and whose sole aid to vision is that they magnify what the eye sees. Plaintiff has never sold any spectacles containing other than convex spherical lenses.

8. Plaintiff is advised and believes and alleges that the use of convex spherical lenses in spectacles will not injure the sight. All that convex spherical lenses in spectacles do is to magnify the object at which they are directed, and it is to that extent that they facilitate vision.

9. The Legislaure of the State of New York has enacted, and the Governor of the State of New York has approved an Act known as Chapter 379 of the Laws of 1928 in the following words:

[fol. 6] Laws of New York.—By Authority

Chapter 379

An Act to Amend the Education Law in Relation to the Sale of Spectacles, Eyeglasses, and Lenses as Merchandise at Retail

Became a Law March 16, 1928, With the Approval of the Governor. Passed, Three-Fifths Being Present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Article fifty-four of chapter twenty-one of the laws of nineteen hundred and nine, entitled "An act relating to education, constituting chapter sixteen of the consolidated laws," as amended by chapter one hundred and forty of the laws of nineteen hundred and ten, such article having been added by chapter eighty-five of the laws of nineteen hundred and twenty-seven, is hereby amended by inserting therein a new section, to be section fourteen hundred and thirty-two-a, to read as follows:

§ 1432-a. Sales of Eyeglasses, Spectacles and Lenses at Retail.—It shall be unlawful for any person, firm or corporation to sell, at retail, as merchandise, in any store or established place of business in the state, any spectacles, eyeglasses, or lenses for the correction of vision, unless a duly licensed physician or duly qualified optometrist, certified under this article, be in charge of and *personal at-

*So in original [evidently word "in" omitted]

State of New York,
Department of State, ss:

I have compared the preceding with the original law on file in this office, and do hereby certify that the same is a correct transcript therefrom and of the whole of said original law.

Robert Moses, Secretary of State.

tendance at the booth, counter or place, where such articles or sold in such store or established place of business. The peddling of spectacles, eyeglasses or lenses from house to house or on the streets or highways, by a person other than such an optometrist or physician, also shall be unlawful, notwithstanding any law providing for licensing peddlers.

§ 2. Section fourteen hundred and thirty-four of such chapter, as added by chapter eighty-five of the laws of nineteen hundred and twenty-seven, is hereby amended to read as follows:

§ 1434. Construction of Article.—Nothing in this article shall be construed to apply to duly licensed physicians authorized to practice medicine under the laws of the State of New York nor to the sale of toy glasses, goggles consisting of plano white or plano colored lenses or ordinary colored glasses, nor to persons who sell spectacles, eyeglasses or lenses only on prescription from such physicians or from such duly qualified optometrists or who duplicate broken lenses.

§ 3. This act shall take effect September first, nineteen hundred and twenty-eight.

[fol. 7] 10. Section 1433 of the Education Law of the State of New York provides that any violation of the foregoing sections shall constitute a misdemeanor and shall be punished accordingly.

11. Under Section 193 of the Penal Law of the State of New York, misdemeanors, where no other punishment is specifically prescribed, are punishable by imprisonment for not more than one year, or by a fine of not more than $500, or both.

12. Plaintiff alleges that it would not be possible for him to continue the sale and trading in spectacles at his store if it were necessary for plaintiff to employ a registered optometrist or a physician to be in charge of the counter at which plaintiff sells spectacles. The cost of hiring such a person would far exceed not only plaintiff's profit from the sale of spectacles, but plaintiff's entire income for the year, and if plaintiff be required to place a duly licensed physician or a duly qualified optometrist in charge plaintiff would be compelled to cease the sale of spectacles.

13. Persons with minor defects in vision constitute about 75% of the persons wearing spectacles, and they are able

to assist themselves by the selection of convex spherical glasses which magnify the objects to be seen. The judgment of the purchaser of glasses or of the person whose vision is defective is the only thing relied upon by the plaintiff and his customers in the sale of glasses. A licensed physician treating the eye relies in large part upon the judgment of his patient in response to questions, but also [fol. 8] may examine the patient to determine the existence of physical defects in the eye. But a person who believes his eyesight to be defective, whether he purchases spectacles from the plaintiff or from others similarly situated, or whether he purchases spectacles from or through an optometrist or physician, in all cases must depend to a large extent upon his own judgment. The sale of spectacles, therefore, with convex spherical lenses is like the sale of any other merchandise from the plaintiff's store,—an attempt by the seller to furnish the buyer with an article that suits him.

14. Plaintiff alleges that the said Act of the Legislature of New York insofar as it requires or would require the plaintiff to have in charge of his spectacle counter a duly licensed physician or a duly authorized optometrist is unconstitutional, in that it deprives the plaintiff of his liberty and property without due process of law, and denies to the plaintiff equal protection of the law.

15. Plaintiff further alleges that the said Act is unconstitutional, in that it purports to regulate the practice of optometry and purports to define the sale of spectacles without prescription, diagnosis or examination as the practice of optometry, and in that it attempts, by indirection and inference, to prevent the sale of spectacles without examination by a duly licensed physician or a duly authorized optometrist, but fails so to do in that it merely requires the presence of such a person at a counter where such spectacles are sold without requiring that the purchaser avail himself or be compelled to avail himself of the services of such physician or optometrist.

[fol. 9] 16. Plaintiff further alleges that it is the public and official duty of the defendants in this suit to enforce the said law if it be constitutional, and that they threaten to enforce the same against this plaintiff and against others similarly situated.

17. Plaintiff alleges that this suit is authorized by law to be brought by him under Section 266 of the Judicial Code of the United States.

18. Plaintiff further alleges that if the defendants be permitted to enforce said Chapter 379 of the Laws of New York of 1928 as against this plaintiff, the plaintiff's business in spectacles will be completely destroyed for the reasons in this complaint set forth, and plaintiff will be deprived of the profit and advantage which come to him from the sale of spectacles, not only the direct profit derived therefrom but the indirect profit resulting from plaintiff's being able to deal in a variety of merchandise and to attract the trade of the customers of each class of merchandise to other articles which the plaintiff has for sale. Such damages as plaintiff will suffer cannot be accurately computed in a court of law, and plaintiff further alleges that he has no adequate remedy at law and can only have redress in a court of equity.

19. Plaintiff further alleges that the defendants, and each of them, unless restrained from so doing by an order of this court, will institute proceedings in the courts of the State of New York to enforce the said law and to prosecute anyone who shall violate its terms.

[fol. 10] Wherefore, plaintiff demands that the defendants, and each of them, their assistants, agents and servants, be restrained, during the pendency of this suit and perpetually, from enforcing or attempting to enforce the provisions of Chapter 379 of the Laws of New York of 1928 against this plaintiff, and plaintiff prays for such other and further relief as to the court may seem just and proper, together with the plaintiff's costs and disbursements of this suit.

Seligsberg & Lewis, Attorneys for Plaintiff. Office & Post Office address: 43 Cedar Street, Borough of Manhattan, New York City. I. Maurice Wormser, W. N. Seligsberg, of Counsel.

[fol. 11] *Duly sworn to by Wm. Roschen. Jurat omitted in printing.*

[fol. 12] IN UNITED STATES DISTRICT COURT

No. 46211

[Title omitted]

NOTICE OF MOTION FOR TEMPORARY INJUNCTION

SIRS: Please take notice that upon the verified bill of complaint herein, and the affidavits of Martin L. Miller, verified August 21, 1928, and of Walter DeYoung, verified August 23, 1928, filed with the complaint herein, we shall move this court at a time to be fixed by the court, for a temporary injunction restraining the defendants and each of them during the pendency of this suit, their assistants, agents and servants, from enforcing or attempting to enforce the provisions of Chapter 379 of the Laws of New York of 1928 against the plaintiff, and particularly from proceeding against the plaintiff in any manner whatsoever, and from permitting to be brought, directly or indirectly, any action or proceeding at law or in equity for the purpose of enforcing said Chapter 379 of the Laws of New York of 1928 against this plaintiff, and for such other and further relief as to the court may seem proper.

[fol. 13] Dated New York, August 28, 1928.

Yours, etc., Seligsberg & Lewis, Attorneys for Plaintiff. Office & Post Office address: 43 Cedar Street, Borough of Manhatten, New York City.

To the above named defendants and each of them.

[fol. 14] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF MARTIN L. MILLER

STATE OF NEW YORK,
County of New York, ss:

Martin L. Miller being duly sworn, deposes and says: I reside at Reading, Pennsylvania, and am general manager of the Pennsylvania Optical Company, which is a manufacturer of spectacles, eyeglasses, lenses and goggles.

The Pennsylvania Optical Company has a factory for making and grinding lenses at Reading, Pennsylvania, employing about 175 people, and grinding over 100 gross pairs of spherical lenses a day, that is to say, over 28,800 individual lenses.

I am 73 years of age. I have been in the optical business for over 50 years, and as long ago as the Centennial Exposition in Philadelphia in 1876 I was selling spectacles over the counter. I have been actively engaged principally in selling the trade ever since that time.

[fol. 15] When I went into the business in 1873, the profession of optometry was unknown. There were a number of physicians,—very few in number,—practicing in the larger cities of the United States as oculists, that is, specialists in the treatment of defects in or diseases of the eye. The general public, however, used no expert or professional advice for the correction of vision, but went to the nearest optical goods store or jewelry store or general store, purchasing ready made spectacles from a stock on hand. Yet there was no general complaint among the people of the United States, nor was there any complaint at all from spectacle wearers that their vision was not being improved. I recognize, as will hereafter appear from this affidavit, that all eye trouble cannot be cured by the sufferer selecting his own glasses, but I believe that a majority of the so-called defects in vision are minor ailments due to advancing years which, as will hereafter be shown, can be helped by the use of convex spherical lenses.

At the present time most of the spectacles bought and sold in the United States are bought and sold at stores over the counter. A customer comes in and selects from various sizes and type of spectacles with different strength of lenses the glasses that help his vision the most. The spectacles thus sold contain convex spherical lenses of different strength which are mere magnifying glasses.

In the larger centers of population, certainly there are very few people who do not know of the existence of oculists and optometrists, and yet they flock to the stores where they procure their glasses cheapest. Many of these people know that it costs considerable sums in proportion to the cost of a pair of glasses (10c to $1.) to consult an optome-
[fol. 16] trist or an oculist. Many of them would be de-

terred from trying to procure very simple aid for their sight if they were compelled to consult someone professionally and pay a professional fee. The mere presence of a physican or optometrist at a counter where spectacles are sold will not insure the use of his services by the customer. If, however, consultation and advice by the professional man attending, become a prerequisite to the purchase of spectacles, purchasers will be driven away by fear of excessive charges. These same people, if they were permitted to try the convex spherical lenses which are helpful to the majority of eye troubles and then discovered that these lenses did not help them, would probably feel compelled to seek that professional aid which at the outset they would decline.

The Pennsylvania Optical Company sells exclusively what are known as glazed spectacles and eyeglasses, that is, spectacles and eyeglasses with convex spherical lenses fitted to frames and ready to wear.

Convex spherical lenses have different degrees of strength, that is, convexity. Their only use it to magnify objects to the eye.

In all my experience of over 50 years in the optical business I have never heard or known of any case in which the use of convex spherical lenses has in any wise harmed the eye or the vision of any person wearing the same, nor can I understand how the use of convex spherical lenses can do any harm. I do understand that some cases of defective vision, near-sightedness or other more serious defects cannot be aided by the use of convex spherical lenses, but that would be obvious to any person suffering from such trouble who tried to use them. They would not aid his vision.

[fol. 17] I have made as thorough inquiry as was possible during the last few weeks in order to be able to estimate, with honesty, the quantity of glazed glasses fitted with convex spherical lenses sold in the State of New York annually. In my opinion, between 500,000 and 600,000 pairs of glazed spectacles, or eyeglasses fitted with convex spherical lenses are sold in the State of New York annually over the counter from drug stores, chain stores, department stores, jewelry stores, country stores and other general stores.

I have personally investigated the statistics of several manufacturers of this type of spectacles for the first 7 months of 1928, and find that they have actually sold 190,000 pairs of this type of spectacles in New York during those 7 months. I should say that the concerns which I have investigated do about 60% of the business in New York in this article, and on that estimate I have based the figures for my calculation of the total. The figure of 190,000 pairs of spectacles sold, however, is a definite, accurate figure of actual sales.

The prices of these spectacles vary according to the diameter of the lenses and their shape, and according to the style of frames to which they are fitted. These glazed spectacles sell at from 10¢ to $1. a pair to the consumer, that is, to the user, and these prices permit of a substantial profit to the retail seller.

It is, of course, common knowledge that people after reaching the age of 40 frequently require the use of spectacles.

I quote from "Anomalies of Refraction and of the Muscles of the Eye," by F. B. Tiffany, M. D., published in 1894, by Hudson Kimberly Publishing Co. Dr. Tiffany was pro- [fol. 18] -sor of ophthalmology at the University Medical Colleg- Kansas City, Missouri.

Tiffany says, at p. 215, with reference to the power of accommodation of the emmetropic (normal) eye that the power of accommodation is

"adequate to meet the demands for about forty or forty-five years, when it begins to wane and refuses longer to supply this demand, and assistance has to be rendered by the use of convex glasses."

I quote from Fuchs' Text Book of Ophthalmology, published by J. B. Lippincott Co. in 1924, 8th edition revised, edited and translated by Duane. Prof. Fuchs was professor of ophthalmology in the University of Vienna.

P. 176:

"The accommodation diminishes with age, and this diminution is manifested by a constant recession of the near point * * *.

The cause of diminution of the accommodation lies in the gradual decrease of the elasticity of the lens * * *. The accommodation recedes equally fast in men and women."

* * * * * * *

P. 179:

"The diminution in the range of accommodation goes on steadily from youth to age. It begins to be troublesome when the near point has receded so far from the eye that the finer kinds of work, and especially the reading of fine print, become difficult or impossible, so that there develops a desire for glasses. This is the case where the near point recedes beyond one-third of a metre, i. e., between the ages of forty five and fifty. This is the period, therefore, to which we assign the beginning of presbyopia.

Presbyopia is not a disease, but a physiological process which every eye undergoes. * * * Ordinarily an emmetrope or one who has been rendered emmetropic by glasses sees distinctly at near points by using his accommodation. In doing this he has in effect added a convex glass to the glass he is using for distance. If this accommodation is insufficient, he must supplement it by an actual convex glass."

[fol. 19] Hartridge on Refraction, By Gustavus Hartridge, F. R. C. S., a recognized authority on refraction says the same thing. I quote from the 9th Edition p. 185:

"The treatment of presbyopia consists in prescribing convex spectacles for reading and near work, so as to bring back the near point to a convenient distance."

The population of New York, according to the State Census of 1925, shows 11,162,151 people and the number of people over 40 in New York State, according to the 1920 Census, was 3,042,806. It can readily be understood that as a large proportion of these 3,000,000 people require the assistance of convex spherical lenses, my estimate, based on inquiry, that between 500,000 and 600,000 pairs of spectacles with convex spherical lenses are sold annually in the State of New York is not excessive.

The State Board of Optometry Examiners of New York published a list of registered optometrists for the year 1926-1927 and I have caused a count of that list to be made, and there are 1850 names on the list.

I have caused a rough count to be made of the optometrists in the Boroughs of Manhattan and Bronx in New York listed in the Classified Telephone Directory, and I find that there are 525 optometrists.

There are many communities in the State of New York, remote from cities, in which there are no optometrists and in which there are no facilities for the purchase or supply of spherical lenses other than the general stores, drug stores or jewelry stores. Small communities have not sufficient business to maintain a registered optometrist. Great hardship will result to many people in the rural communities if they are unable to purchase these simple spherical [fol. 20] glasses which will aid people who have reached the age of presbyopia.

Not only this, but optometrists consider themselves professional men on a par with physicians, lawyers, dentists and architects. Throughout the United States, they are making concerted endeavors to procure legislative sanction for the use of the title doctor. However, since 1913 the use of the title doctor by an optometrist, unless he has acquired the use by other study and examination, has been forbidden in New York. (See Sec. 1433 of the Education Law, formerly Sec. 307 of the Public Health Law.) On the other hand, of course, optometrists are, to a certain extent, merchants selling optical goods and it is their perfectly natural practice to try to add to the price of their goods a price for professional services. Spectacles with convex spherical lenses sold over the counters by others than optometrists are sold cheaper, because they have not the added element of services of a professional man.

I know enough about optometry and eye trouble to know that in many cases, and I should say in most cases, that convex spherical lenses are all that are needed, and that in a goodly number of cases more than convex spherical lenses are needed, and that in another large class of cases eye troubles are due to things with which the optometrist cannot cope and which only physician generally familiar with

more than the science of refraction is able to treat and cure.

I quote from the Optometric Weekly of July 5, 1928, p. 672. This is a weekly paper published in the interest of optometrists and has high standing among them. It conducts from time to time a question and answer column, edited by George A. Rogers, its scientific editor. At the [fol. 21] place indicated, p. 672 of the issue of July 5, 1928, Mr. Rogers purports to answer a very lengthy question about the vision of a farmer and stableman 30 years old and who has been practically blind in the right eye since birth. Mr. Rogers' answer to the lengthy question is as follows:

"There is no special feature to this case on which advice that may prove helpful can be offered. Such cases do not require advice. The only thing to do is to correct each eye as well as possible, and to harmonize the two corrections to each other so as to make vision comfortable and as good as possible, not expecting to make vision binocularly normal. The woods are full of cases of this kind. Every optometrist meets them and simply does the best he can with them, and lets it go at that. They are only partly refraction cases."

This affidavit is made at the request of plaintiff's counsel voluntarily and without compensation.

Martin L. Miller.

Sworn to before me this 21st day of August, 1928. Arthur Abraham, Notary Public, New York County. N. Y. Co. Cl'k's No. 182, Reg. No. O-168. Kings Co. Cl'k's No. 71, Reg. No. 228. Bronx Co. Cl'k's No. 11, Reg. No. 3044. Commission expires March 30, 1930. (Seal.)

[fol. 22] In United States District Court

[Title omitted]

Affidavit of Walter DeYoung

State of New York,
County of New York, ss:

Walter DeYoung being duly sworn, deposes and says: I reside at 301 West 57th Street, Borough of Manhattan, New York City.

I am sales manager of the American Spectacle Company, 136 West 52nd Street, Borough of Manhattan, New York City, and have been connected with that company for 22 years. Prior to that time I was engaged in the optical business in Great Britain.

I have read the affidavit of Martin L. Miller, submitted herewith, and I believe the facts therein stated to be in all respects correct and true.

As a salesman for my employer for the last 22 years, I sold over 1,000,000 pairs of spectacles fitted with convex spherical lenses throughout the United States to optometrists, opticians, druggists, jewelers, general stores and [fol. 23] country stores.

I have travelled on the road selling merchandise for over 25 years and have visited and re-visited my customers regularly. Never in all that time has any complaint ever been made to me that any of my customers, or any of their customers, suffered harm or injury through the use of convex spherical lenses.

According to the World Almanac of 1928, p. 478, there are 505 incorporated villages in the state of New York, and according to the same authority, p. 480, there are 61 cities in the State of New York.

From my own experience, I venture to state that there are over 5,000 places in the State of New York today where spectacles with convex spherical lenses can be purchased, and I believe that this is a material under-estimate of the number of places, because there is hardly a settlement with a general store, however small, where there is not a sample case of spectacles with convex spherical lenses.

The optometrists throughout the United States, and particularly in the State of New York, have openly declared their desire to monopolize the business of selling glasses, and it is a known fact that one of the tenets of their occupation is that only optometrists should sell spectacles. The optometrists at heart do not believe that even physicians should be allowed to examine eyes and test them for glasses.

I refer to The Optical Journal and Review of Optometry of August 16, 1928. This is the leading journal dealing with optometry. At p. 17 there is an editorial entitled "Exemption of the Physicians". I append as Exhibit A

to this affidavit a copy of the article in full, and I refer particularly to the following:

[fol. 24] "The arguments of our correspondent against allowing physicians to engage in the same practice that Optometrists pursue, doing so without any other authorization than their medical license, are sound and have often been heard with approval by Optometrists."

* * * * * * *

"Time brings changes in conditions, however, and it detracts in no sense from the glory due to the organization and legislative leaders of former days, if some time it shall appear opportune to get medical exemption clauses stricken from the Optometry laws. It will be agreed by Optometrists generally that such action would mark a great advance for Optometry as a profession. It is most unfortunate that, while Optometric services are defined by law and certain requirements made for Optometrists, yet any medical man may perform exactly the same kind of services without further proving of qualifications than the ordinary medical license."

I also refer to the optical Weekly of July 5, 1928, containing an excerpt from the report of the 1928 New York Legislative Committee, that is to say, the Committee of the New York Optometrists advocating the passage of the law attacked in this suit as well as the law permitting the use of the title doctor by optometrists and of the law known as the "Saving Clause Bill" which ripened into Chapter 391 of the Laws of 1928 and which provides that if a part of the Optometry Law is declared unconstitutional that shall not affect the validity of the remainder. The Freiberg-Cooke Bill, or the so-called Glazed Goods Bill, ripened into Chapter 379 of the Laws of 1928, here under attack.

I refer to this report as evidence that the motive behind the passage of the Act was the personal interest and the selfishness of the optometrists and not the public interest. I refer particularly to the following sentence in the report which, so far as it is quoted in the Optical Weekly above referred to, is appended to this affidavit as Exhibit B.

[fol. 25] "The Glazed Goods Bill was introduced in the 1928 session of the legislature and was sponsored in the as-

sembly by Assemblyman Cooke of Buffalo, and in the Senate by Senator Freiberg of that same city. Your committee, along with the state's attorney worked unceasingly in the interest of this piece of legislation. Every opportunity for strategy was taken advantage of and instead of the usual blowing of trumpets and an out in the open campaign, it was decided that a quiet under-tunnel maneuvre be employed. Your Legislative Committee together with your state's attorney, obtained from Dr. James Sullivan, the Deputy Commissioner of Education, an endorsement of this bill, and not only did they obtain an endorsement, but Dr. Sullivan because of his interest in the conservation of public eyesight wrote letters to the leaders of the Senate and Assembly requesting favorable action upon this bill.

The Freiberg-Cooke Bill was passed by the legislature and it went to the governor for his signature of approval. By the time the bill reached the governor's desk he had before him letters of endorsement from Dr. Sullivan, The Eyesight Conservation Council of America, the president of the New York State Optometric Association, the president of the American Optometrical Association, the Optical Board of Trade of the City of New York and the Better Business Bureau of the City of Rochester.

The Bill was signed by his Excellency, the Governor, thereby creating Chapter 379, Laws of 1928, so that on and after September 1, 1928, the sale of ready-made glasses will be prohibited by stores which do not employ licensed and registered optometrists or physicans."

According to the estimates of population referred to in Mr. Miller's affidavit, there are over 3,000,000 people in New York over the age of 40. In my judgment 75% of these people require spectacles with convex spherical lenses. This estimate is not based on guess, but on my own life long experience in the optical business and my knowledge of the quantities of convex spherical lenses sold and used in various centers of population. I should say that a man between the ages of 40 and 45, commencing to use convex spherical lenses, would have to change about once every three years. The time might be shorter; it might be longer; the average I should say would be three to four years. On this basis, some 500,000 people annually would require convex spherical lenses. That estimate comes very

[fol. 26] close to Mr. Miller's estimate based on quantities sold.

I have never been engaged in the manufacturing of spectacles, either frames or lenses, but my experience has taught me proportions and values. Concerns like the Pennsylvania Optical Company and the American Spectacle Company are able to produce spectacles fitted with convex spherical lenses in large quantities, and they are therefore able to sell these articles in large quantities to distributors on a large scale, such as tremendous chain stores. The largest distributors of spectacles today are the chain stores. The court will recognize from its own knowledge that these chain store branches pervade the large and small centers of population, and they are able to supply spectacles to the consumer almost at his door at a price which the humblest and poorest laborer can afford.

For information, I list certain of the larger chain stores operated in New York City with the number of stores which the telephone directory shows they are operating in the Boroughs of Manhattan, Bronx, Brooklyn and Queens:

Chain stores	No. of stores in Manhattan and Bronx	Number of stores in Brooklyn and Queens
Charles & Co.	2	5
F. W. Grand	1	
S. S. Kresge	3	7
S. H. Kress	3	
J. G. McCrory	3	2
Metropolitan Chain Stores	1	1
F. W. Woolworth	37	33

[fol. 27] According to my information, which I believe is accurate, each one of these stores sells spectacles at prices varying from 10c to $1 a pair. The difference in price does indicate a difference in the lenses, but only a difference in the size (diameter) of the lense and the styles of the frames.

The average optometrist cannot sell in a year the number of pairs of spectacles that the chain store can dispose of in a week, with the result that he cannot purchase his supply of frames and lenses at the favorable prices which

are available to large distributors, nor has the optometrist the advantage of selling other merchandise besides optical goods, so as to reduce the overhead cost of sales. The result is that the optometrist selling spectacles is compelled to charge higher prices than the large wholesale buyer and wide distributor.

I have no desire either to criticise the optometrists nor to decry the value of their services in cases where they are needed, and I recognize that times move and people must move with them. I state to the court, however, that the largest class of sufferers from impaired vision have nothing but presbyopia, that is to say, their eyes are older at 40 and 50 than they were at 20 and 30, and I say to the court that these people can be aided by the use of convex spherical lenses which can be bought at the low price of $1 and under, and that the presence of a physician or optometrist at the counter where the spectacles are sold is an utterly useless thing.

It is the general practice of these large purchasers of glasses to guarantee the glasses to their customers, and if a customer finds that the glasses do not help him they can [fol. 28] be either exchanged or returned, and the purchase price refunded.

These stores render a real service to the public and particularly to those in humble circumstances who cannot afford to add to the cost of their glasses the optometrists' charge for services and overhead.

The cost of medical service in the United States has become a matter of great concern, and philanthropists and labor leaders are making constant study of this situation.

I quote from the Monthly Labor Review, published by the Bureau of Labor Statistics of the United States Department of Labor, Vol. 26, No. 5, issue of May 1928, pp. 1-4, An investigation of 115 cases of employees was made with reference to the percentage of their income which went to medical services. In the first class, 9 employees with income of $3,000 and over (average $3,466.67) 5.5% of their income went for medical services. In the next group, 50 employes with incomes between $2,000 and $3,000 (average $2,316) 6.3% of their income went for medical services. In the next group, 65 employees with incomes under $2,000 (average $1,589.54) 6.2% of their income went for medical

services. The grand average showed average salaries of $1,992.63 and average percentage thereof which went for medical services 6.2%. The article speaks for itself and is easy of reference, but I call attention to the fact that it divides services into normal medical services and special services, and includes among the normal medical services the services of the physician, the dentist and the oculist. Presumably, the oculist includes the optometrist.

[fol. 29] The importance of the question of cost of medical and similar services is well illustrated by the fact that the monthly periodicals are constantly dealing with the subject.

See the American Labor Legislation Review for June 1928 containing an article by Michael M. Davis on "The High Cost of Being Sick."

Atlantic Monthly for October 1928, containing an article on "The Cost of Illness" by Ann Miller Downes, prepared after consultation with physicians (p. 572).

The company with which I am affiliated sells a great many pairs of spectacles which retail at $1. On several occasions in order to determine the difference in price, I have taken spectacles which I purchased for $1 at one of the chain stores and applied to dozens of optometrists in the State of New York to have the same duplicated. In each case the price charged by the optometrist for duplicating the spectacles which I had bought for $1 ranged from $7.50 to $12. In my opinion, that difference in price is typical of the difference between the prices charged in the chain and general stores and the prices charged by the optometrists for the same merchandise. The optometrist charges from 5 to 15 times as much as the price charged by the large distributor who at all times sells spectacles at a profit.

Nobody can dispute that the science of refraction and of optometry and the study of diseases of the eye have progressed marvelously during the last half century, and particularly during the last 25 years. There is one basic fact, however, which is often overlooked, and that is that the purpose of spectacles is to aid the eye and the vision of the [fol. 30] user, and that the last and final test of the value of spectacles is "Do they or do they not help the user to see better." That is not a layman's theory. It is the

theory of physicians, optometrists and scientists writing the leading texts on optometrics and optometry.

I quote from Charles H. Pixley's work "An Optical Primer," published by F. A. Hardy & Company in Chicago, about 1916. The very first words of this primer are the following:

"Trial Lenses and How to Use Them

An actual test with trial lenses always has been, and always must be, the final test for the correction of refractive errors.

The trial case then is the supreme court, or, as it has been aptly termed, 'the court of last resort.' To this court, then must come for final adjudication the findings of all other tests, whether they be subjective or objective, monocular or binocular, or whether they be made with or without the aid of instruments, or with or without the use of cycloplegics.

The trial case test, then, being the supreme test, either approves of or modifies the results obtained by all other tests."

I quote from The Optician's Manuel by Dr. C. H. Brown, published by The Keystone Publishing Co., Philadelphia, 1918, at p. 229:

"A subjective examination is one which can only be made with the assistance of the patient and depends on the information elicited by the patient's answers * * * A subjective examination reveals information which must come from the mind of the subject * * * No examination is complete unless it is both subjective and objective."

I quote from Hartridge on Refraction, 9th Edition, p. 231:

"First, notice the general appearance of the patient, then the shape of the head and face. Next the eyes, as to whether they are large and prominent, or small and sunken-looking. Listen patiently to the sufferer's complaints, and having submitted to this ordeal, test the acuteness of vision of each eye separately, and afterwards together, writing down the result, remembering always to commence with

[fol. 31] convex glasses. Then place the near type in the patient's hand, noting the number of the type and the distance at which it can be read."

In this same work, Hartridge gives examples of different cases where he has treated, and in all of them the final test is the spectacles wtih which the patient sees the best.

In the ordinary case of presbyopia, that is, eyesight slightly weakened because of advancing years, it requires no expert assistance for a man to know what glasses he needs and he can pick them up for 10c or $1 and get as much service out of them as if he paid $10 or $20 or $100. He does not need expensive frames or nose pieces. He needs something that will slightly magnify. If after the expenditure of the small amount required for the purchase of convex spherical lenses, he finds that they do not aid him his course is clear, but if they do help him he has paid what he can afford and obtained what he wants.

The purpose of the modern apparatus used by the optometrist is not to enable the patient to see better, but to enable the optometrist to check up on the patient's own diagnosis of his case and his own selection of the glasses that enable him to see best.

See the article by G. C. Farrell in the Optometric Weekly of March 11, 1926, in which he says:

"Go back to the old days; a customer comes in for a pair of glasses, the optician reaches down and gets a box of glazed glasses, the customer tries on different ones until he finds a pair that suit him. The next step in advancement was the trial case and test card. The customer was seated in a chair and told to look at a card across the room and then lenses were put into trial frame that had been put on the customer, and after a few changes of lenses the ones [fol. 32] were selected that the customer said he could see the best with. This was considered fitting. We still have some that continue this old practice of trial case methods. The trial case has its place but modern methods and instruments have given us a greater number of checks on conditions."

No matter who it may be that is examining the patient, whether it be the most distinguished oculist on the faculty

of the universities, or the humblest and most recent graduate of a school of optometry, the one supreme and final test is "Will these spectacles help the patient see" and nobody can say that but the patient. If the spectacles that a man buys for 10¢ or $1. do not help him, there may be something more that is needed besides the mere magnifying by convex spherical lenses. What that more is should be determined by an oculist or optometrist or both. But if the man's vision for the moment improves by the use of convex spherical lenses and if that improvement continues, he does not need anything more and no quantity of examinations or tests will make him need any more, and, as appears above, the vast and overwhelming majority of people who need glasses only need the convex spherical lenses and they need no assistance in testing them to see which lense gives them the best vision.

The optometrists in their eagerness to monopolize the purchase and sale of spectacles resent very much the fact that intelligent laymen are able to find out for themselves what is best for their eyes. I refer to an article by Dr. Frank D. Jackson of Norfolk, Virginia, read at a meeting of the Virginia Academy of Optometry December 17, 1927 and reported in The Optical Journal and Review of Optometry of March 9, 1928, at p. 23. The article is appended to this affidavit as Exhibit C.

[fol. 33] I refer particularly to Dr. Jackson's complaints that able, educated and presumably intelligent people are able to buy their own glasses to their own satisfaction, and that very often the so-called expert optometrist orders a change in these glasses which turns out not to be satisfactory. I ask the court to note particularly so much of the article as indicates that it is the unskilled or little skilled optometrist who makes money. I also call attention to the fact that nowhere in Dr. Jackson's article is there a suggestion that the people who buy their own glasses are injured any.

I have, during my experience in the optical business, had occasion frequently to employ optometrists. I may say that the average wages of a competent optometrist are about $50. weekly.

Walter DeYoung.

THE OPTICAL JOURNAL
AND REVIEW OF OPTOMETRY

Exemption of the Physicians

AN esteemed subscriber wrote us recently urging that efforts should be made at once to eliminate from Optometry laws the clauses that exempt physicians. Of course, Optometrists would like to see these clauses repealed, but the real questions are whether or not it is possible to accomplish this in the near future and whether or not it is wise at this time to make any attempts to do so. The arguments of our correspondent against allowing physicians to engage in the same practice that Optometrists pursue, doing so without any other authorization than their medical license, are sound and have often been heard with approval by Optometrists.

We feel, however, that several of the ideas expressed in the communication are not quite in accord with the way the facts are understood by those who had the most to do with getting Optometry laws enacted. Our zealous correspondent is not alone in entertaining these ideas, for we have received at intervals several other communications of a similar tenor as to these matters. So, we are calling attention to these particular ideas at this time in order to correct what we believe to be somewhat erroneous notions. Precise knowledge of the facts is essential to any prudent consideration of the subject. Without such knowledge, action might be advocated that would do more harm than good, if attempted.

* * *

One of the ideas is that Optometrists, in seeking the laws, were obsessed with a baseless fear of medical men and that this fear led to the needless incorporation of the exemption clauses in regard to physicians in the laws. The assertion is made that the medical organizations never asked for such clauses in the Optometry laws. This assertion is probably correct. Yet the inference from it is quite unfounded, we are certain.

The medical men, or at least their organizations, in nearly all of the States, were so unfriendly to these laws when they were proposed that they considered it beneath their dignity to ask for exemptions for their profession. Instead, they made it known in the legislative halls that they proposed to fight the enactment of such laws to the last ditch, and that is exactly what they did. Let us not suppose that they were weak and without influence. They had strong influence in every legislature. The officers of our State associations and the legislative committees learned this very definitely when the bills were introduced, and a hard fight faced them in all but two or three States. In most of the States it took years of effort to get a law.

An impression that our correspondent entertains is evidently that, if the clauses exempting physicians were omitted from the bills, the oculists might have been neutral, or even friendly to the measures, since the purpose of the laws was to shut out from practice those not properly prepared. But he is mistaken in thinking that our zealous legislative committees did not try to get the oculists to either approve the bills or to keep their hands off, in the legislative battles. The men who had charge of Optometry's legislative interests were on the alert for every possibility of that kind, but the oculists refused to agree to the arguments that were presented over and over. The refracting oculists kept the medical organizations in the different States in opposition to the bills.

* * *

Another mistaken notion is that Optometry could have got the bills passed even against medical opposition, without making the concession of exempting the physicians. Let our correspondent confer, if he has opportunity, with some of the Optometrists who fought for the bills at the State capitals. He will find that they duly and fully canvassed the possibility of doing this and they learned from the legislators and the governors of the States that the bills could not be enacted without such exemption clauses. There was no guesswork as to this. The very legislators who helped most in pushing the bills successfully would have refused to handle the bills without that clause. It was a case of accepting a half loaf or getting nothing at all.

* * *

In short, Optometric leaders of the days when laws were enacted got the best legislation for our profession that was possible at the time. They did their work well. Let nobody have any doubt as to that fact.

Time brings changes in conditions, however, and it detracts in no sense from the glory due to the organization and legislative leaders of former days, if some time it shall appear opportune to get medical exemption

clauses stricken from the Optometry laws. It will be agreed by Optometrists generally that such action would mark a great advance for Optometry as a profession. It is most unfortunate that, while Optometric services are defined by law and certain requirements made for Optometrists, yet any medical man may perform exactly the same kind of services without further proving of qualifications than the ordinary medical license.

This anomalous condition must be rectified some time. But Optometrists must not act prematurely. If Optometrists in any State think that the time may be ripe for seeking a change in the law repealing the exemption clause in regard to physicians, then it is for them to deliberate with care as to the proper procedure. The conventions of the State associations are the places where such a question may be considered and discussed. There must be no rushing into needless trouble. Many at present feel that the wise course is "to let well enough alone," even though "well enough" is not all that it should be.

* * *

We doubt if the organization in any State is ready at this time to make such an effort as is proposed. The majority opinion in most States is probably that the time has not yet arrived for the desired action. Is there reasonable hope for success in such an effort in any State? Starting a hopeless fight would be unwise. It is a question whether or not the time has come for the Optometric organization in any State to give any special and serious consideration to this subject. Individuals with the best of intentions may sometimes be over-zealous and rashly advise action that would not lead to the desired results. The mature judgment of the majority must be the guide, the safeguard against rash action and the signal for united effort when the time is ripe.

Spectacles and Golf Players

By J. R. Mutch, F. S. M. C., Aberdeen, Scotland.

IT is significant that no golf champion has worn spectacles, and that players in the front rank at the present day, with few exceptions, do not wear glasses. The obvious deduction is, that defective eyesight imposes a handicap which corrective glasses have not altogether overcome.

The fault cannot be always in the defective eyesight, as suitable glasses will make vision in an eye, having a refractive error only, equal to a normal eye, so the handicap must actually be caused by the appliance which corrects the error. That the fitting often is not all that could be desired cannot be denied, but this more often is the fault of the wearer and not of the optician, as the majority of people seem to think that the same pair of glasses should do for all occasions. Lenses and frames can now be got which allow of a large field of clear vision.

It is a fact, however, that countless numbers are enduring this restricted field of view through wearing the wrong shape of lens and badly fitted frames. If the frame were properly fitted the wind would have no effect on it.

The disadvantage which cannot altogether be overcome is the blurring of the lenses by rain, and in the British climate this undoubtedly is a factor which cannot be ignored. There is a composition in the market which prevents spectacles from steaming, but this would be of little use against raindrops. Miss Corbett undoubtedly lost her final match through her glasses becoming blurred by rain, but Harry Vardon does not seem to consider that she possibly would not have won her previous matches if she had not worn her glasses.

Anyone who is in the habit of wearing glasses cannot possibly play good golf without them. In fact, the majority of people who are obliged to wear glasses would not be able to play golf at all without them. As to others who know they have an eye defect, and do not wear a correction—well, it all depends on their golf whether or not they should wear glasses on the links, and, of course, it does not rain all the time.

If a person has better vision in one eye than in the other it requires no effort to fix with one eye only. As it is only when the two eyes produce exactly the same image that a person has binocular vision, the imperfect image is readily ignored. As Mr Vardon recently said, however, perfect one-eyed putting can only be the exception. When two eyes are used the eyes have to converge to see a near object, the amount of convergence varying with the distance. It is by the aid of this function that a person can most accurately judge a distance, so that by shutting one eye you actually curtail this sense of distance measuring.

In conclusion, I would just like to point out that since the War the manufacture of spectacle lenses and frames has been greatly improved, and as it takes a few years to make a champion golfer, the day will possibly be not far distant when the he-spectacled one will be a living contradiction to arguments that such a player can not be a champion.

Eyeball Glasses

Transcleral eyeglasses which are shaped to the eye and actually rest on it, being inserted under the eyelid, have appeared in Hamburg, Germany. They are described as being better for the sight than anything previously invented, and they do not collect moisture as the wearer passes from cold to warmth.—Cincinnati (Ohio) *Times-Star*.

EXHIBIT B TO AFFIDAVIT OF DR YOUNG

Optometry, suggested that the members submit 50 theses on various subjects and solutions of the problems, for the best of which awards will be made at the 1929 convention of the New England Council of Optometry. The banquet was a very enjoyable affair. Those who attended had the pleasure of listening to a number of interesting speakers, among them Captain Parker, who gave a very graphic picture of existing conditions so far as automobile accidents go and the means taken to prevent same. Invitations were extended to all members to attend a clam bake at Perry's Grove, New Bedford, in July.

Excerpt from Report of New York 1928 Legislative Committee.

Prior to embarking upon a legislative program for 1928, your chairman deemed it essential and wise that a meeting be called in the city of Albany for the purpose of determining what that course or program should be. At that meeting it was definitely decided that the Doctor Title Bill should again be pressed with all vigor and determination. Your Legislative Committee was also advised to cause to be introduced in the legislature a bill to protect the legal practice of the profession in the State. Subsequently thereto a dinner meeting was had by the members of your Legislative Committee in the city of New York. This luncheon was attended by Drs. Leo M. Mayer, Thomas McBurnie, John F. Hill, J. J. Hogan, M. H. Harris, L. Zucker and our State's attorney, Assemblyman Berg. At this meeting it was suggested by Dr. M. H. Harris that something ought to be done by way of legislation that would help the profession financially, and it was decided that the Glazed Goods Bill be given preference over the Doctor Title Bill.

Organized optometry in the State of New York sponsored three pieces of legislation to be introduced in the 1928 session of the legislature:

1. The Berg Bill, commonly known as the Doctor Title Bill.
2. The Freiberg-Cooke Bill, better known as the Glazed Goods Bill.
3. The Eberhard Bill, better known as the Saving Clause Bill.

In considering the activities connected with the Glazed Goods Bill, your committee deems it wise to review the history of this piece of legislation, so as to impress upon organized optometry the fact that laws are not created or enacted overnight. That it requires years of missionary work and an expenditure of funds and energy before the force of legislative sentiment is sufficiently established to accomplish the desired result.

The Glazed Goods Bill has been in the legislature for years. In 1925 this bill was introduced by Assemblyman Meagan, and was opposed by various concerns operating chain stores and department stores and it had much professional opposition. It was impossible to move this bill out of committee in 1926, and it required more than ordinary work and influence to bring it out of committee in 1925. It was reported to the assembly without recommendation of the committee, but when it reached the floor of the house the opposition manifested itself in no uncertain terms, and the bill was recommitted and defeated. In an effort to revive the bill, Senator Hickey of Buffalo thereupon introduced the identical measure in the Senate. This move would ordinarily have revived the bill, but being made during the closing week of the session, and the Senate operating under the Rules Committee, it was impossible to resurrect the bill.

Because of the instructions given your Legislative Committee by your 1926 convention, all of the effort and energy that had been put behind the Glazed Goods Bill in 1926 was diverted to the Doctor Title Bill of 1927.

The Glazed Goods Bill was introduced in the 1928 session of the legislature and was sponsored in the assembly by Assemblyman Cooke of Buffalo, and in the Senate by Senator Freiberg of that same city. Your committee, along with the state's attorney worked unceasingly in the interest of this piece of legislation. Every opportunity for strategy was taken advantage of and instead of the usual blowing of trumpets and an out in the open campaign, it was decided that a quiet under-tunnel maneuvre be employed. Your Legislative Committee together with your state's attorney, obtained from Dr. James Sullivan, the Deputy Commissioner of Education, an endorsement of this bill, and not only did they obtain an endorsement, but Dr. Sullivan because of his interest in the conservation of public eye-sight wrote letters to the leaders of the Senate and Assembly requesting favorable action upon this bill.

The Freiberg-Cooke Bill was passed by the legislature and it went to the governor for his signature of approval. By the time the bill reached the governor's desk he had before him letters of endorsement from Dr. Sullivan, The Eyesight Conservation Council of America, the president of the New York State Optometric Association, the president of the American Optometrical Association, the Optical Board of Trade of the City of New York and the Better Business Bureau of the City of Rochester.

The bill was signed by His Excellency, the Governor, thereby creating Chapter 379, Laws of 1928 so that on and after September 1, 1928, the sale of ready-made glasses will be prohibited by stores which do not employ licensed and registered optometrists or physicians.

The committee now directs your attention to consideration of the Eberhard Bill. This is a piece of legislation, the importance of which has been generally minimized when considered along with the Freiberg-Cooke Bill. The Eberhard Bill, which is substance added to the Optometric Law of our State a constitutional saving clause is by far the most important piece of legislation that has ever been enacted for optometry. Prior to its enactment should any section of the Optometric Law have been attacked, and that section declared unconstitutional by a court of competent jurisdiction, then such declaration of unconstitutionality would have swept aside the entire Optometric Law, and the profession would have been in the very same position that it was prior to 1908. In other words, there would be no optometric profession or law.

Now, since the passage of the Eberhard Bill, Chapter 391, Laws of 1928, our profession is surrounded by an impregnable barrier by way of a Saving Clause whereby any section of our law may be found to be unconstitutional without such finding effecting the rest of our law.

program in this state and is of importance also to other states in their law enforcement work.

The last case was against Alf Eisenhouser, of Independence, an agent for the True Fit Optical Company of Chicago. He was fined $25. The case against Eisenhouser was brought following a recent decision by the attorney general of Missouri holding that the use of self fitting devices constitutes the practice of optometry. Eisenhouser's defense was that he was not violating the law because he merely provided a mechanical device with which his customers fit their own eyes.

Judge A. B. Lovan, assistant attorney general conducted the case for the prosecution. Dr. George J. Krukine, secretary of the Missouri State Board of Optometry, and Dr. H. C. Borchers, testified, stating that Eisenhouser was not qualified to fit glasses and that fittings made with the mechanical device used by Eisenhouser are likely to harm the eyes of the patient.

Judge Lyon did not hesitate to render a decision against Eisenhouser, on the grounds that the use of a self fitting device is a clear violation of the law.

The case will be appealed to the Court of Appeals of Missouri. It is confidently expected that the decision will be sustained by that court.

The Northern Indiana Optometric Association met for the second time in South Bend, Tuesday, June 26th. The meeting was devoted to the selection of an educational program for the next year. The details of the program were placed in the hands of a committee and will be reported at the next meeting. In addition, the topic for the next meeting will be "Shrunk Retinoscopy."

Those present were Drs. Bogardus, Beery, Burke, Cain, Ellis, La Chat, Hyman Lemontree, Morris Lemontree, Palmbl and Spangle of South Bend, Kaplan of Michigan City, Booth of Valparise, Dragoo of La Porte, Hankin, McDonald and Regal of Gary, Laroche and Jackson of Elkhart and Wellington of Goshen.

The next meeting will be Tuesday, July 31st, at the Y. M. C. A., South Bend, and all optometrists in the vicinity are cordially invited to attend.

Vermont Holds Convention.

An interesting Forum Meeting was held during the Nineteenth Annual Convention of the Vermont Optometric Association, under the direction of Dr. Fay McFadden, the "warrant" calling for a round table discussion on the subject "Are Optometrists Making Too Much Money?" The answer to this produced a number of ironical responses, many confessing that they had obtained as high as $2.00 for examinations and others that they were taking only a dollar with apologies. However, the consensus seemed to be that a fee of $3.00 be charged for all examinations, the cost of the glasses being added to this amount. Also that optometrists are by no means asking for their services what the dentist charges for his, and therefore fees should be advanced as rapidly as feasible in order to give the very best service to patients. It was suggested that inquiries should be made of their occupations, which would have a distinct bearing on the glasses with which they were fitted. The matter of referrals was also under discussion, their use being greatly favored, there being a good field for varied size segments.

The convention opened on Tuesday, June 19th, at the Hotel Vermont in Burlington with a very satisfactory attendance, and in the afternoon a most delightful boat ride on beautiful Lake Champlain was a feature of the entertainment. Everyone in the party spent a pleasant time and came back in the festive for the evening session and the round table talk.

The business session was held on Wednesday, the 20th, and the following officers were elected: President, A. B. Jordan; vice-presidents, A. B. Saul, F. McFadden, G. F. Preston; secretary-treasurer, L. F. Folsom; auditor, O. F. Prentiss.

Dr. James Shaw of New Hampshire was elected as delegate to the A. O. A. convention to be held in Grand Rapids the week of the 22nd, having previously been admitted to membership. During the course of the day Dr. Shaw delivered a "peppy" talk admonishing optometrists not to lose sight of the necessity for advancement in their profession and to continue educational work in order that optometry might increase in its usefulness to humanity and grow greater in power as the years come and go. Dr. Samuel W. Baker of Massachusetts discoursed interestingly on eye examination in which he said it was imperative for optometrists to make a physical examination of the eye to ascertain diseased conditions. Dr. Clinton R. Padelford of Massachusetts spoke on optometry from both the ancient and modern standpoints. Muscle work was also included in his discussion.

In appreciation of the splendid work of Dr. Houghton the convention voted an appropriation toward the gift presented him at the New England convention which was held recently.

Massachusetts' Annual Meeting.

The following officers were elected at the annual meeting of the Massachusetts State Society which was held at the Parker House, Boston, approximately one hundred members and their guests being present: Ralph E. Eaves, president; first vice-president, Clinton R. Padelford, Fall River; second vice-president, Frank S. Jones, Boston; third vice-president, Francis C. Ryan, Springfield; secretary-treasurer, Curtis R. Wells, Boston; Boston representative on the executive committee, Henry Lustig.

Dr. Ralph E. Eaves, re-elected president of the State Society and Dr. Geo. S. Houghton were appointed delegates to the National Convention to be held in Grand Rapids week of July 22nd.

Gen. A. Parker, Registrar of Motor Vehicles, who spoke at the meeting, warned motorists that they would be compelled to undergo stricter physical and mental tests, including vision, in an attempt to reduce the ever mounting number of fatal automobile accidents. According to Captain Parker 500 people were killed in the state of Massachusetts the past year. The warning to motorists resulted in several vigorous editorials in the Boston newspapers the next morning. Dr. Deane, chairman of the State Board of Optometry, also delivered a talk, in which he said that optometrists would continue to co-operate with the Registrar of Motor Vehicles to an even greater extent than previously. Dr. Geo. S. Houghton, Director of the Distinguished Service Foundation of

EXHIBIT C TO AFFIDAVIT OF DE YOUNG

Fitting the Patient's Mind

By DR. FRANK D. JACKSON, Norfolk, Va.

Read at Meeting of the Virginia Academy of Optometry, Dec. 17, 1927

EVERY Optometrist of this day desires to be successful in two ways. As a refractionist, he must acquire a reputation for accuracy in his profession. As a business man, his success will depend on his reputation for giving satisfaction.

Therefore, to be successful he must not only fit his patient's eyes accurately, but he must satisfy that patient by fitting his mind. To fit the eyes accurately is comparatively simple, for a man of exact and careful methods of refraction may formulate a prescription for glasses that is optically perfect. But the patient may not be satisfied; that is, though his eyes are fitted correctly, his mind is not suited or satisfied.

Sometimes the same accurate prescription that fits the eyes also suits the mind; many times a modification of it must be made, if the patient is to be satisfied.

Optometrist's Double Task

Many people have not sufficient intelligence to be suited or satisfied with the correction that fits their eyes. They can, of course, tell what suits them, that is, satisfies them; any child can do that. But they cannot know what fits their eyes; it takes expert skill to know that. This part of the task is for the Optometrist. So that patient has only to pass judgment on what suits him, or what satisfies his mind, while the Optometrist has the double task before him of fitting the eyes as accurately as possible and suiting the mind. That is, he must determine what modification of an exact correction, if any, is necessary and will meet the grade of intelligence on the part of the patient in the use of his glasses.

Long experience will surely reveal the fact that able, educated, and presumably intelligent people often bring but little intelligence to bear on the act of wearing glasses, this having no allusion to the mechanical abuse they shower on their glasses. This observation explains why many people who can afford the best get their glasses at the ten-cent store or the 98-cent counter, and are entirely satisfied. It is because they select them without aid or advice and thus take what suits their mind, not what fits their eyes accurately. This latter point is entirely secondary, they think. It might be truthfully said that they bring a 98-cent grade of intelligence to the glasses question, or that they are not critical beyond what 98 cents' worth of glasses may embody.

This type of patient is often a sad disappointment to the careful Optometrist who may fit them with an accurate correction, possibly sphero-cylinder lenses at oblique axes, and of unequal powers, and then is cast down by their complaint that the old 98-cent glasses were better. It is, in fact, useless and thankless to fit a 98-cent grade of intelligence with $8 lenses; in fact, from the standpoint of the 98-cent mind, such lenses are a mis-fit; hence the lack of satisfaction.

This line of thought has a bearing on what many of us have noted: That the successful Optometrist—successful in a business way—may not be noted for his accuracy of refraction. He may be sufficiently unskilled—or barely skilful enough—to suit the minds of his patients; he may actually lack the skill accurately to fit their eyes if he so desired.

The accurate and scientific Optometrist may be rejoiced at first—note that I say "at first"—when he gets a case from the office of the unskilled man and truthfully criticises the accuracy of the previous correction, which probably has not given entire satisfaction, after all. The former feels no hesitancy in saying that he will turn out a more satisfactory fit; he is presuming, of course, that a more accurate refraction will be the more satisfactory. Later, he is dismayed to learn that his nice work is not more satisfactory, and is often less satisfactory than the crude work of his predecessor in the case.

The point may be raised that the accurate correction ought to be also a satisfactory one; it is, in many cases, and in many cases only the most exact of corrections are endurable, and these must be figured down to the eighth diopter in sphere and cylinder, and the half degree of axis—and in weak corrections, too. But these are not the cases of the 98-cent minds; there's the difference that makes all the difference.

Conclusion

So, to consider optometric success from the business standpoint, the Optometrist must bring to bear a fine discrimination, a delicate balancing of judgment, a measuring of the temperament, an estimation of the personal equation of the patient, that the work may give satisfaction. For an Optometrist indeed feels humiliated if his higher knowledge, his elaborate equipment, his shiny scopes and mometers turn out, after all his care, a less satisfactory pair of glasses than the patient might have picked out at the 98-cent counter.

"Presbyopia and Prism Exercise"

IN the Feb. 24 issue of THE JOURNAL was a copy of a letter received from G. H. Arensfeld, Houston, Tex., in which he expressed warm appreciation of the first of the articles by J. H. Leventhal on "Presbyopia and Prism Exercise" published in recent issues.

Dr. Leventhal has since sent to THE JOURNAL a copy of the letter of acknowledgment that he sent to Dr. Arensfeld, saying:

"I am gratified to know that you—who I consider to be the dean of American Optometrists, and whose writings I have followed for many years with interest and admiration—are in accord with my views. 'Praise from Caesar is praise indeed!'

"I hope you will like also the concluding sections of the article."

The concluding articles of the series have been presented since the exchange of letters.

A communication from Harris Gruman, Lebanon, Pa., under date of Feb. 28, says:

"I have just finished the perusal of Dr. Leventhal's essay on 'Presbyopia and Prism Exercise' and wish to state that he is in the forefront for original thought and handling of a difficult subject. Dr. Leventhal has a knack of attacking a problem from every angle and showing just why he reaches certain conclusions. Original thinkers are increasing in number in our ranks and with them the future of Optometry will be secure."

A Case of Muscular Imbalance

By S. Rosenson, Asheville, N. C.

I WAS consulted by Mrs. J. P. L. This patient had made the rounds of a number of oculists. The glasses that had been fitted to her proved invariably to be failures. The patient asked me to examine her eyes, just to find out my opinion as to whether she could obtain comfortable vision when reading. Although I had been recommended very highly to her, on account of her previous disappointments, she could not conceal her doubts as to my ability to render a fitting in glasses that would be comfortable.

In the examination room the patient stated that she was a school teacher, 41 years of age. The main complaint as to all the old glasses was "eyes ache and draw when attempting to read longer than a few minutes at a time." The regular routine of refractive tests revealed the correction.

R. E. +1.75 sph. ◯ —0.25 cyl., axis 180.
L. E. +1.50 sph.

The near point of accommodation was found to be at 30 cm.

This looked like a simple case and I was beginning to wonder why so many oculists of ability should have failed. Then I made the muscle tests at 20 ft. The results were negative. Making the near muscle tests, I found to my surprise that the patient has 3△ esophoria at 35 cm. I first made sure of this finding and then without hesitation added +1.00 O. U. Patient said that she could see to read comfortably with the correction.

Two pairs of glasses were prescribed. Besides the distance prescription, I instructed the patient to wear the following glasses for prolonged near use of the eyes:

R. E. +2.75 sph. ◯ —0.25 cyl., axis 180.
L. E. +2.50 sph.

Later, the patient returned to tell me that she was enjoying perfect comfort with this arrangement. I took the opportunity then of checking up my original findings and found them to be correct.

This was a case of overdevelopment of the convergence. I do not believe that bifocals would have given the patient the comfort secured with the two-pair arrangement, as with bifocals, the patient would have been uncertain as to which she was looking through, the uppers or the lowers. With either one, the patient could see the finest print perfectly. By releasing the accommodation of 1.00 D. of effort, we unlocked the convergence one meter angle, which was about what the case called for in order to restore perfect muscular balance.

Oculist's Views on Smoking

PAWTUCKET, R. I., March 5—Cigarette smoking was given a clean bill of health, insofar as affecting vision is concerned, by Dr. Joseph I. Dowling, Providence eye specialist, in a talk a few days ago at the weekly luncheon meeting of the local Kiwanis Club.

Discussing the effect of tobacco on the optic nerve, Dr. Dowling stated that it is the pipe or cigar smoker and not the person who uses cigarettes, whose vision is affected. Commenting on blindness resulting from "otherwise sensible" men drinking poisons liquor, he stressed the double hazard to eyesight created by the use of questionable liquor and heavy tobaccos.

Zone Meeting in Fall River

FALL RIVER, MASS., March 5—The monthly meeting of the Optometrists of Zone 9, Massachusetts Optometric Society, was held last Thursday evening at the Mellen House here with a good attendance. A paper was read by W. I. Brown, New Bedford, on "The Circulatory System." This was one of the series of studies being taken up by the members of Zone 9 under the general head of "Biology the Optometrist Should Know."

The following Optometrists were present:

Fall River—C. B. Padelford, Paul O. Barre, George H. Wild, M. M. Padelford, Foster Namah, Hector P. A. Lavoie and A. V. Poirier.

New Bedford—A. J. Phaneuf, W. I. Brown, Thomas F. Payne, William G. Howdt, J. F. Arsenault, W. B. Heath and A. C. Hatters.

Sworn to before me this 23rd, day of August 1928. R. Lipnick, Notary Public, Bronx County. Bronx Co. Clk's No. 187, Reg. No. 2904-B. N. Y. Co. Clk's No. 907, Reg. No. 9095-A. Commission expires March 30, 1929. (Seal.)

(Here follow Exhibits A, B, and C to affidavit of DeYoung, marked side folio pages 34, 34½, 35, 35½, 36, and 37)

[fol. 38] In United States District Court

No. 46211

[Title omitted]

Notice re Motion for Preliminary Injunction

Sirs: Please take notice that upon the motion for preliminary injunction herein, we shall rely upon the amended complaint filed herein on the 7th day of September 1928 instead of upon the original complaint referred to in the original notice of motion.

Dated New York, September 7, 1928.

Yours, etc., Seligsberg & Lewis, Attorneys for plaintiff. Office & Post Office address: 43 Cedar Street, Borough of Manhattan, New York City.

To the above named defendants and each of them.

[fol. 39] In United States District Court

No. 46211

[Title omitted]

Order Setting Cause

The court having considered the verified bill of complaint, duly filed in the above entitled action, and the motion of the plaintiff for a temporary injunction herein, and it appearing to the court that the suit is one requiring the presence on

the hearing of the application for a temporary injunction of three judges, one of whom shall be a Circuit Judge of the United States or a Justice of the Supreme Court,

It is by the court ordered that the application for such temporary injunction be held on the 18 day of October 1928, at 2.30 o'clock in the afternoon, in Room of Circuit Court of Appeals of the United States Court House, in the Post Office Building, Park Row, Borough of Manhattan, New York City.

Dated Oct. 9, 1928.

Frank J. Coleman, United States District Judge.

[fol. 40] In United States District Court

[Title omitted]

Notice of Motion to Dismiss

Sirs: Please take notice that the annexed motion to dismiss the bill of complaint and the amended bill of complaint herein, this date filed in the District Court of the United States for the Southern District of New York in the office of the Clerk of said court and that the said motion will be set down for hearing and brought on for argument at a term of the said court, constituted pursuant to Sec. 266 of the Judicial Code, to be held at the Old Post Office in the City and County of New York, Southern District of New York on the 2nd day of October, 1928, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Dated New York, September 24, 1928.

Yours, etc., Joab H. Banton, District Attorney in and for the County of New York. Edward V. Loughlin, Solicitor for Joab H. Banton.

To Messrs. Seligsberg and Lewis, Solicitors for Complainant, 43 Cedar Street, New York, N. Y.

[fol. 41] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS BILL OF COMPLAINT AND AMENDED BILL OF COMPLAINT

Now comes the defendant, Joab H. Banton, as District Attorney of the County of New York and upon the bill of complaint and the amended bill of complaint herein, moves that the said bill of complaint and the amended bill of complaint be dismissed for the following reasons and upon the following grounds, to wit:

1. That it appears upon the face of both the bill of complaint and the amended bill of complaint that the facts stated therein are insufficient to constitute a cause of action in equity.

2. That it appears upon the face of both the bill of complaint and the amended bill of complaint that the complainant has a plain, adequate and complete remedy at law.

3. That it does not appear upon the face of both the bill of complaint and the amended bill of complaint, and no sufficient facts are averred therein to show, that the intervention of a court of equity and the assumption of jurisdiction by such a court is necessary or essential in order to [fol. 42] effectually protect the property or rights or property of the complainant from great and irreparable injury or from any injury whatsoever.

4. That it appears on the face of both the bill of complaint and the amended bill of complaint that the complainant is not within the class of persons who are or may be injured by the alleged unconstitutionality of the provisions of the statutes set forth in the bill of complaint.

5. That chapter 379 of the laws of 1928, is a valid statute duly passed by the legislature of the State of New York in the due exercise of its lawful and constitutional powers and does not violate any of the provisions of either Article 1, Sec. 8 of the Constitution of the United States or the 14th Amendment to such Constitution; and it does not appear upon the face of either the bill of complaint or the amended

bill of complaint or from the facts averred therein that the said statute, or the enforcement thereof by the State of New York by and through its governmental and administrative agencies, operates or will operate to interfere unwarrantably with the complainant's business or to deprive or deny the complainant of the equal protection of the laws or to deprive him of liberty or of any property or rights of property without due process of law.

6. That Chapter 379 of the New York Laws of 1928 is a valid statute, duly passed by the Legislature of the State of New York, in the due exercise of its lawful and constitutional powers and does not violate any of the provisions of either Article 1, Sec. 8 of the Constitution of the United States or the Fourteenth Amendment to such Constitution; and it does not appear upon the face of the bill of complaint or the amended bill of complaint or from the facts averred [fol. 43] therein, that the said statute or the enforcement thereof by the State of New York by and through the governmental and administrative agencies, operates or will operate to interfere unwarrantably with complainant's business or to deprive or deny the complainant of the equal protection of the laws, or to deprive him of liberty or of any property or rights of property without due process of law.

7. That it appears upon the face of both the bill of complaint and the amended bill of complaint that to grant the relief sought by the complainant would constitute an unlawful and unconstitutional interference by the agencies of the Government of the United States with the lawful and constitutional power, right and duty of the State of New York and its governmental agencies (including the District Attorney of the County of New York) to prosecute violations of criminal statutes of the State of New York.

8. That it appears upon the face of both the bill of complaint and the amended bill of complaint, that this court is without power or authority to grant the relief or to render the judgment and decree prayed for.

9. That no sufficient facts are alleged in either the bill of complaint or the amended bill of complaint to warrant or justify the granting of the relief prayed for or any other equitable relief.

Wherefore, for the reasons and upon the grounds aforesaid, the defendant, Joab H. Banton, as District Attorney of the County of New York, respectfully moves this Court that the bill of complaint herein be dismissed as to him. Dated: New York, September 24th, 1928.

Joab H. Banton, District Attorney of the County of New York. Edward V. Loughlin, Solicitor for Defendant Joab H. Banton, as District Attorney of the County of New York, 137 Centre Street, New York, N. Y.

[fol. 44] In United States District Court

Affidavit of James Sullivan

State of New York,
County of New York,
City of New York, ss:

James Sullivan, being duly sworn, deposes and says: I am the Assistant Commissioner for Higher and Professional Education connected with the State Department of Education, with offices at the Education Building, Albany, N. Y.

It has been my duty to review any and all legislation which directly or indirectly had any effect upon the professional education laws of the State of New York.

I recall that prior to the introduction of the bill which ultimately became Chapter 379 of the laws of 1928, there was brought to my attention the unwholesome conditions attendant upon the sale of ready made eye glasses or spectacles in the State of New York. I immediately made an investigation of the facts. That an evil existed was immediately apparent, and upon all of the facts developed by my investigation I, over my signature endorsed the bill or Chapter 379 of the laws of 1928 and urged the legislature and the governor to exercise the police power of the state to protect people not only from self-imposed injury, but against the unfair and illegitimate marketing of eyeglasses which were ultimately sold without any semblance of scientific or professional approximations or accuracies.

I consider the enactment of this statute vital to the health and well-being of the people of the commonwealth, and when the bill was pending in the assembly, I so advised the committee in charge of it and I wrote to the leaders of the assembly urging favorable action upon it.

When the bill was pending in the senate, I informed the committee of that body, who had it in charge, and wrote to [fol. 45] the leaders of the senate urging them to take favorable action upon it.

After the bill had passed both houses of the legislature, I directed a communication of endorsement and necessity to His Excellency, the Governor of the State of New York, urging his signature of approval to the legislation.

I am a public officer. I am not an optometrist nor am I a physician. I am charged with the administration of education laws of the state and with the added duty of seeing to it that the people of the state are protected either by wise education laws or against unwise education laws.

In considering all of the data and material that came to my attention, I did not only consider the information itself, but I considered the source of the information. For example, the Eysight Conservation Council of America sent out considerable information. My investigations show it to be a public spirited organization composed of ordinary laymen who are interested in the eyesight of the public, educators, scientists, engineers, and others interested in public safety, welfare and betterment. This organization was to the rest of my knowledge and belief not interested in the sale of eyeglasses or spectacles or in their manufacture and distribution. It is primarily interested in eyesight conservation. They have issued from time to time various pamphlets and leaflets for distribution as follows:

"The Story of Eyesight Conservation."

"The Effect of Motion Pictures on the Eyes."

"Light in the Home, by M. Luckiesh, Director, Lighting Research Laboratory, of Cleveland, Ohio."

"Defective Eyes in Schools and Industry."

"Light, Sight and Safety, by R. E. Simpson, Engineer, Travelers Insurance Company."

[fol. 46] "Glare and its Relation to Eyesight Conservation, by F. C. Caldwell, A. B. M. E., Professor of Electrical Engineering."

"'Is His Eyesight Worth Saving? Reprinted from The Literary Digest."

"The Importance of Eye Care."

The information given me by the American Optometrical Association and the New York State Optometric Association, I found to be predicated upon that sound scientific research which only professional scientists are capable of, and I must of necessity place some reliance upon the findings of professional men who have been admitted to license only after their having had to comply with the very rigid and stringent educational requirements set by the laws of the State of New York.

The Tri-county Association for the blind are in nowise directly or indirectly interested in the manufacture, sale or distribution of eyeglasses. They are interested in preventing blindness, reducing eyesight hazards, and in furnishing eyeglasses and spectacles to the poor of the state who could not afford to pay for them. The services of the association for the blind are free to the public. This, of course, had a great deal of effect upon the legislation in question since the state wanted to be sure that some provision was made for those who could not afford the services of a professional man. In this connection, my investigations also disclosed that the New York Optometric Society, though made up of optometrists who earn their own livelihood in the refraction and sale of glasses, maintained in the City of New York an eye clinic to which the poor and suffering public could come and from which they could obtain glasses or spectacles free of cost.

Sometime ago either just before or just after the bill of [fol. 47] complaint in the case of William Roschen v. Albert Ottinger, was served, there came to me a request that the State Education Department desist from enforcing Chapter 379 of the laws of 1928 as against certain people who wish to continue violating that law, but who wish to test its constitutionality. I was asked to refrain from enforcing such statute against such people during the pendency of the litigation. I informed the party that the Legislature of the State of New York had acted, and that as the administrative officer of the Education Department, I could not under any circumstances give to them any power to grant the re-

quest. I stated that if they were sincerely and honestly contesting the constitutionality of the statute rather than simply trying to get away from the consequences of law violation, that they could very well engage the part time services of a duly licensed optometrist or a duly licensed physician during the pendency of the litigation.

As the Assistant Commissioner for Higher and Professional Education of the State of New York, I say that Chapter 379 of the laws of 1928 received my endorsement only after a very thorough and searching inquiry, and that the law itself is an exercise of police power by the state comparable to the exercise of police power in all of the other education laws, and is necessary to the eyesight conservation, health and well-being of the people of the commonwealth.

James Sullivan.

Sworn to before me this 17th day of October, 1928. Benjamin Handle, Notary Public, Kings Co. Clk's No. 195, Reg. No. 298. New York Co. Clk's No. 494, Reg. No. 0-348. Queens Co. Clk's No. 969, Reg. No. 3177. Commission expires March 30, 1930.

[fol. 48] In United States District Court

[Title omitted]

Affidavit of Frank D. Morehouse

State of New York,
County of Warren, ss:

Frank D. Morehouse, being duly sworn, deposes and says: I reside at Glens Falls, New York, and I am president to the Tri-county Association of the Blind, Inc.

The Tri-county Association of the Blind, Inc., is an organization embracing the counties of Saratoga, Washington and Warren, in the State of New York. This organization is primarily interested in preventing blindness, and is an official member of the State Board of Charities.

As President to the Tri-county Association of the Blind, Inc., I wish to inform this Honorable Court that this asso-

ciation did communicate with the New York State Legislature during its 1928 Session, and in that communication we approved the legislation that subsequently was enacted as Chapter 379 of the Laws of 1928. Our association has found, in its experience, that considerable blindness has resulted from the use of improper eyeglasses or spectacles, and that the State ought to exercise its police power to [fol. 49] protect the people against blindness and against the unscientific, unethical, and dangerous practice of the manufacture, sale and distribution of eyeglasses or spectacles.

I am particularly interested in the affidavit of Martin L. Millier, wherein it is asserted that the smaller communities of the State cannot afford to possess the services of a skilled optometrist or a physician. The three counties embraced by my association, namely, Saratoga, Washington and Warren Counties, are in truth the rural communities to which Mr. Miller refers in his affidavit. I want to say to this Honorable Court that Mr. Miller's statements with reference to rural communities and the facilities existent in such communities for the procurement of a proper optometrical service is not the truth. It is a little inconvenient, but not any more so than it is inconvenient for these communities to obtain proper medical or surgical services.

The Tri-county Association of the Blind, Inc., have for many years past offered to the poor a free optometrical service, as a part of its program to prevent blindness and to reduce this very sad state of affairs to a minimum. We conduct public clinics and I am pleased to report to this Honorable Court that the physicians as well as the optometrists of our territory have unselfishly contributed their time, technical ability, and effort to this work, and I am reliably informed that the same conditions prevail in the various territories embraced by associations and organizations of like character and endeavor.

Spectacle vendors, eyeglass pedlars and merchants selling ready-made glasses have contributed, largely, to the horror that has befallen our State as a result of blindness. The association aforesaid, of which I am president, unhesitatingly looks upon Chapter 379 of the Laws of 1928 as [fol. 50] the only means at the command of the State to cope with the situation. This law is just as necessary to

the vision of the people of the commonwealth as are the professional laws governing the many other professions and I know that our association so advised the Legislature of the State of New York during the Session at which this statute was enacted.

Frank D. Morehouse.

Sworn to before me this 23rd day of October, 1928.
Loyal L. Davis, Notary Public, Warren Co., N. Y.

[fol. 51] In United States District Court

[Title omitted]

Affidavit of Guy A. Henry

State of New York,
County of New York,
City of New York, ss:

Guy A. Henry, being duly sworn, deposes and says: I am the General Director of the Eye Sight Conservation Council of America.

The Eye Sight Conservation Council of America was organized to promote the general conservation and betterment of vision by: arousing public interest to a proper appreciation of the importance of the eye hygiene and the care of eyes, especially insofar as it pertains to defective vision and protection in hazardous occupations; disseminating knowledge regarding the optics of the eye, the prevalence and the need for correcting visual errors and of suitable correction against the special hazard and eye strain encountered in various industrial occupations; circulating information on the proper lighting of homes, schools, factories, offices and all public and private buildings; striving [fol. 52] to bring about the universal eye examinations of industrial workers and of school children both rural and urban, also urging the importance of periodical eye examinations of every one; developing or improving optical aids for the alleviation of visual troubles; compiling reliable data, publishing and circulating literature pertaining to eye care; enlisting the aid of, and rendering service to State

and Federal governments and all departments of health and education; cooperating with all existing agencies concerned in any degree with the movement for better vision and striving to co-ordinate their efforts; to act in all of these enterprises without bias or prejudice actuated preeminently by a desire to further the public welfare and to increase the efficiency, comfort and happiness of humanity.

The Eye Sight Conservation Council of America is in nowise interested in the profession of Optometry or the medical profession as such. Its membership is composed of laymen who are interested in the eyesight of the public, educators, scientists, engineers, and others interested in public safety, welfare and betterment. The organization is interested only in carrying the message of eye care to the general public, and is not interested in any profession. The officers of the council are as follows:

L. W. Wallace, President, Bailey B. Buffitt, Vice-President, and myself General-Director.

The directors of the council are as follows:

Bailey B. Burritt, New York City, General Director, N. Y. Association for Improving the Condition of the Poor.

F. C. Caldwell, A.B. Me., Columbus, Ohio, Professor of Electrical Engineering, Ohio State University; Member of Committee on Legislation, Illuminating Engineering Society.

R. M. Little, Albany, N. Y., Director Bureau of Rehabilitation, State Department of Education; Member Board of Directors of the National Safety Council.

Morton G. Lloyd, Ph.D., Washington, D. C., Chief of Safety Section, U. S. Bureau of Standards; Member of Committee on Lighting Legislation, and Former Vice-President Illuminating Engineering Society.

L. W. Wallace, Washington, D. C. Executive Secretary American Engineering Council.

[fol. 53] The Board of Councillors of the council is as follows:

Hon. James J. Davis, Washington, D. C., Secretary of Labor, U. S. Dept. of Labor.

Arthur L. Day, Ph. D., Washington, D. C., Director of Geophysical Laboratories of Carnegie Institution of Washington.

Jas. T. Grady, LL. B., New York City. Director, Dept. of Public Information Columbia University. Publicity Director American Engineering Council.

Chas. H. Judd, Ph. D., Chicago, Ill. Director, School of Education, University of Chicago.

Frederick B. Robinson, Ph. D., LL. D., New York City. President, College of the City of New York.

Jos. W. Roe, M. E., New York City, Head of Industrial Engineering Dept. New York University. President Society of Industrial Engineers.

G. E. Sanford, Schenectady, N. Y. Past-President American Society of Safety Engineers.

Richard E. Simpson, B. A., Hartford, Conn. Research Engineer, Member Board of Directors, Illuminating Engineering Society.

Jno. J. Tigert, M. A. (Oxon) LL. D., Washington, D. C. Commissioner of Education U. S. Bureau of Education.

Thomas D. Wood, M. D., New York City. Teachers College Columbia University. Chairman Joint Committee on Health Problems in Education of Nat. Council of Nat. Educational Assn. & A. M. A.

I have read the affidavits of Mr. Martin L. Miller and Mr. Walter DeYoung made on behalf of the application for an injunction herein, and wish to state that both affidavits contain misrepresentation and much irrelevant matter. The arguments advanced are ridiculous and in a number of instances refute their own claim—in fact, their arguments are as weak as their own case. Such statements can only be made by persons who are either not familiar with the progress made by scientific research and development, or who are utterly without conscience insofar as the eyesight and health of the people are concerned.

[fol. 54] The Eye Sight Conservation Council of America has published from time to time various articles, one in particular is a pamphlet entitled "From beyond the toll gate." It will be of interest to this court to read it in full:

"Just over the brow of the hill, at the entrance to the Valley of Regret, there is a toll gate. Thousands upon thou-

sands have passed that way, and paid. This toll-gate is on one of the many roads which branch off the Highway of Life. The name of this road is ignorance. Beyond the toll-gate, in the Valley of Regret, is an old, old man with furrowed brow and grizzled beard, for he has lived through many generations. He carries a great load and his back is bent with the weight of the burden. His name is experience. He is weary and sorrowful, for he has cried aloud, mostly in vain, to travellers on the highway, to avoid the way of ignorance.

Why do so many fail to hear and why do they not heed?

Experience pleads today for the conservation of the nation's sight. He pleads that we may heed before it is too late. He pleads that we may seek the knowledge that will lead us to a new world through better vision. And here is what experience tells us:

A large proportion of the human race have defective vision most of which is remediable.

25% of school children have manifest defects of vision (corrected and uncorrected) and other symptoms of eye-strain, which hamper materially their school work.

The U. S. Public Health Service reported that of 11,780 school children tested 37% had defective vision.

Approximately 25% of the 25,000,000 school children in the United States are retarded in their studies and fully one-third of retardations is conservatively estimated as due to defective vision.

Of 42,275 students examined in 22 colleges and universities an average of 38% were found with defective vision.

Fully 66% of those gainfully employed in the U. S. have defective vision.

It is estimated that of the 2,000,000 industrial accidents occurring annually in the United States 10% are eye injuries. In one state for a period of eight years $6,000,000 was awarded in compensation for 4,689 lost eyes.

Experience also tells us that defective eyesight is the cause of many other human ills. It is responsible for many of the thousands of Misfits and N'er-Do-Wells that we find about us everywhere.

Experience calls to you—"Conserve your eyesight:"

Do not abuse the eyes.

Rest the eyes when tired; do not strain them.

Do not read or work with poor light.

Avoid fine print, blurred letters and shiny paper; they are likely to strain the eyes.

Do not save light at the expense of the eyes.

Do not read or work facing a bright light.

Do not judge illumination by the brightness of lamps. [fol. 55] Dim light and glaring light make the eyes tired and weak. Use light that is agreeable to the eyes.

Lamps should be shaded or enclosed with diffusing glass so as to prevent the bright light coming directly to the eye.

Bring the work to the eyes, not the eyes to the work. The proper reading distance is 12 to 15 inches from the eyes.

Have eye diseases treated by a competent specialist. Delay may be serious.

Avoid patent nostrums, eye washes and salves unless prescribed by an eye specialist.

Protect the eyes against wind and dust and hazardous occupations.

Avoid cheap glasses. Their imperfections may be worse than no glasses at all. Glasses cannot be fitted by mail.

Do not neglect "cross eye"; it may lead to blindness of one eye.

Avoid reading on moving trains.

Do not use a common towel; infection is frequently transmitted thereby.

Do not condemn children and workers as stupid—test their eyes.

If not sure of the condition of the eyes have them examined by one who is competent to give advice as to their care.

If glasses are prescribed, wear them as advised.

Do not neglect eyestrain, it may lead to serious trouble.

Do not be indifferent to the condition of the eyes.

Heed the voice of experience from beyond the Toll Gate which leads into the Valley of Regret."

I wish to state to this Honorable Court that during the 1928 legislative session of the New York State Legislature, I forwarded to that body a communication endorsing the bill which subsequently became Chapter 379 of the laws of 1928, which chapter is being attacked in this proceeding.

The Eye Sight Conservation Council of America by virtue of its experience and research believes that the human eye is of paramount importance, not only to the social and general welfare of the state, but to the industrial and commercial well being of the commonwealth as well.

Eyeglasses cannot be properly fitted by mail or over a merchant's counter. Not only does the Eye Sight Conservation Council of America compliment the legislature of the State of New York for having protected the people from [fol. 56] the exploitation attended upon the selling of eyeglasses and spectacles by mail and the self-imposed refraction of eyes by the sale of readymade glasses over the business counters of inexperienced merchants, but it also deems such legislative act to be a necessary exercise of the police power of the state to safeguard the well-being, health and happiness of the state.

G. A. Henry.

Sworn to before me this 11th day of October, 1928.
Gasper T. Gall, Notary Pub., N. Y. Co., No. 11.
Reg. #9149. Commin. expires 3/30/29.

[fol. 57] In United States District Court

[Title omitted]

Affidavit of Ernest H. Kiekenapp

State of Minnesota,
City of Faribault,
County of Rice, ss.

Ernest H. Kiekenapp, being duly sworn, deposes and says: I reside at Faribault, Minnesota, and am Secretary of the American Optometric Association Inc.

In addition to being the Secretary of the American Optometric Association, I have at various times served on the State Board of Examiners in Optometry in the State of Minnesota, as President of the Minnesota Association of Optometrists, and as Secretary of the International Association of State Boards of Optometry Examiners.

I am a graduate Optometrist, having graduated from the Stone School of Optics, of St. Paul, Minn., in 1910, and I took the Post Graduate work at the DeMars School of Minneapolis, Minn.

I have been engaged in the private practice of Optometry for the past twenty years, and since 1921 have attended Post Graduate Clinics annually and I have applied myself [fol. 58] to a diligent, thorough and painstaking study and research of the science known as Optometries.

I have read the affidavits of Martin L. Miller and Walter DeYoung, offered to this Court in connection with this application for an injunction. Both of these affidavits are made for the purpose of protecting the material wealth involved in this litigation and not with an eye single to the conservation of the eyesight of the public. As a matter of fact, both Mr. Miller and Mr. DeYoung are business men, neither of them ever having any scientific training or background, nor having reached that point in scientific Optometry where they can speak authoratatively.

The statements made in the affidavits of Mr. Miller and Mr. DeYoung are so preposterous and unthinkable and so very flagrantly commercial, that I hesitate to dignify them by making a scientific answer.

The Court will note that both Mr. Miller and Mr. DeYoung do not claim any scientific Optometrical knowledge. As for Mr. Miller, He claims to have been actively engaged in selling the trade since 1876, and as for Mr. DeYoung, he claims to have been selling for his employer for the past twenty-two years. Both are salesmen, neither are optometrists.

On Page Two of Mr. Miller's affidavit, the following statement appears:

"A customer comes in and selects from various sizes and types of spectacles with different strength of lenses the glasses that help his vision the most. These spectacles thus sold contain convex spherical lenses of different strength [fol. 59] which are mere magnifying glasses."

This statement I want to brand *has* a deliberate attempt to mislead this Honorable Court into believing that the glasses or spectacles chosen by the customer consists of lenses of different strength to meet the needs of the customer. This

is as far from the truth as the earth is from the heaven. I most respectfully submit that there is no ready-made pair of eyeglasses or spectacles sold in the United States that is composed of lenses of different strength. In other words, the right lense and the left lense are identically the same in every instance. Here is where science clashes with business interests. For it is definitely proven that the right and left eye of every individual is different. This Honorable Court should readily see and understand that where a pair of glasses consisting of two lenses which are identically alike in make, manufacture and strength is adjusted to a pair of eyes which are different, harm, to at least one eye if not both, must inevitably result. Mr. Miller means that the various pairs of ready made glasses sold are of different strength in so far as it is possible to make them of different strength on a commercial basis, but in every instance both lenses of each pair of spectacles sold are identical in strength and they do not take into consideration the difference between the right and the left eye of a human being, and I am hopeful that this Honorable Court will not be deluded by the inference drawn in Mr. Miller's affidavit to the effect that lenses of different strength are sold to each individual customer.

Mr. Miller makes an affidavit as a business man and as an individual who is vitally and materially interested in the exploitation of the poor and ignorant people, and as such finds fault with the professional fees charged by Optometrist or physician in connection with the refraction of [fol. 60] eyes, and the sale of glasses. It is quite natural for Mr. Miller to make this affidavit because the concern which he represents has been specializing in the manufacture and sale and distribution of the very ready-made eyeglasses which have for the past many years undermined the health of the people, and his concern has been one of the centers forming the basis for the mail order frauds and misrepresentations throughout the United States. But surely this Honorable Court will take into consideration the scientific training the Optometrist and the physican has had; the advance that has been made in the State of New York as regards educational standards and requirements for men and women professing to be able to render relief to the suffering public, and the research and development of Optometry as a profession, and the value of the services

which this profession has unselfishly rendered the public. Mr. Miller claims, or would have this Court believe that the Optometrist and the physician sells to their patients lenses which are worth from ten cents to One Dollar. This is not true. The only people who sell lenses of this character and quality are those commercialized business interests who are more concerned with an annual profit than they are with the eyesight or health of the public. The Optometrist and the physician do not sell this quality or character of lense to their patients, but for the purposes of this discussion let us assume that the Optometrist and the physician sells the same type of lense as is sold by business houses such as is represented by Mr. Miller and Mr. DeYoung. The box of pills, or the package of powders, or the bottle of fluid that the druggist sells upon the physician's prescription, may be worth only a few pennies, but the druggist in compounding that prescription charges for [fol. 61] the professional services that he renders in compounding the same. The pharmacist, under the Laws of the State, is compelled to undergo many years of training and study before he can hold himself forth as being able and competent to fill the prescription of a physician, and for this special training, qualification and fitness, he may charge what he deems to be a reasonable professional fee. Regardless of the price of the lense, this Court will not be hood-winked by any commercial or financial requests because a telephone call will bring to a patient's home, the physician, who will examine the patient and issue a prescription. The only thing the physician will give the patient is a piece of paper upon which is written a prescription. The paper, in and of itself has no material value, yet no one can find fault because the physician charges what he deems to be the value of his professional services. Similarly the podiatrist charges for his professional services, even though his patient receives not so much as a prescription.

On Page Three of Mr. Miller's affidavit is the very honest and frank admission that there is a difference in certain eyesight cases. He makes such admission in the following language:

"I do not understand that some cases of defective vision, nearsightedness or other more serious defects cannot be

aided by the use of con ex spherical lenses, but that would be obvious to any person suffering from such trouble who tried to use them. They would not aid his vision."

This admission contains the crux of all professional legislation. Who is to determine the kind of lenses necessary to the preservation and conservation of the eyesight of the individual involved? Mr. Miller along with the other persons interested in this litigation says to this court that the [fol. 62] individual himself should decide what lenses are to be used. The Legislature of the State of New York has said that only persons who are qualified and trained shall decide this question, just as it has said that only graduate physicians, duly licensed to practice medicine, shall diagnose the ills of the public, and just as it has said that only duly licensed accountants may call themselves certified public accountants, and just as it has said that only duly licensed physiotherapists shall hold themselves forth as registered physiotherapists, and so on throughout the professions, or throughout those avenues of business which are closely linked to the welfare, well-being and happiness of the people of the commonwealth.

As previously stated, I would not dignify the attempt made by the two salesmen, Mr. Miller and Mr. DeYoung, to speak with authority upon this very scientific and technical question, about which they know nothing, except for the fact that this Honorable Court should be in possession of scientific information such as I can give by virtue of my qualifications and long experience in the Optometrical profession. With that end in view, I wish to state the following:

When one experiences eye troubles, which are usually in the nature of pain in the eyes, blurred vision, photophobia (intolerance of light); conjunctivitis (inflammation of the outer membrane of the eye, such as in pink eye); hordeolum (sties); headaches in the following regions: frontal (over the eyes), temporal (in the temples), occipital (at the base of the skull), and occasionally a vertex (on the top of the head); blepharitis (inflammation of the lid margins), an itching of the eyes, we consider them as "Local symptoms"; and, in addition to the above, there may be [fol. 63] other symptoms such as, general nervousness,

nausea, or fatigue. A person fitting glasses must understand the causes of all the foregoing symptoms, and these symptoms must be classified by an experienced practitioner into two general classes, "Local" and "Constitutional."

It is essential, in refraction work and in fitting lenses to the human eye, that the practitioner be competent and qualified, because many of the symptoms above named may reveal the presence of constitutional diseases, which immediately and forthwith require the attention of a skilled physician, and the first step taken by the Optometrist in the examination of patients who visit his office, is that of Ophtalmoscopy, wherein the retina of the eye is viewed and may reveal the presence of constitutional diseases far in advance of any other clinical tests. Such diseases, which it is highly important for the Optometrist and physician to recognize, in order to protect not only the vision of the people of the State, but to protect the people of the commonwealth against the various diseases which make this manifest in the eye, are: Bright's Disease; diabetes; syphilis; arterial sclerosis (hardening of the arteries); toxic amblyopia (toxic poisoning) etc.

Again, the symptoms enumerated above may reveal local trouble only, and this again is divided into two distinct classes: pathological (diseases of the eye) and refractive errors and muscular imbalances. The practitioner in his course of study is required to differentiate between a pathological condition of the eye and the abnormal functioning of an eye caused by a refractive error or muscular imbalance. By use of the opthalmoscope the skilled Optometrist or the physician readily recognizes a pathological condition, which may reveal any of enumerous diseases of the eyes; such as glaucoma; cataract; choked disc; detachment [fol. 64] of the retina; Optic Atrophy, and others too numerous to mention—all of which are highly dangerous diseases of the eye requiring treatment or surgical operation by a skilled physician and surgeon.

These types of errors can only be determined correctly by the most scientific kind of an examination, comprising both subjective and objective procedure. Unlike the spectacle peddler or merchant who sells ready-made glasses, the skilled Optometrist or the physician is able to determine, with the scientific instruments now at his disposal, the

minutest error of refraction. The old purely subjective examination is today obsolete, since in subjective examination, the patient virtually examines his own eyes and admittedly determines, in an unscientific way, what glasses he shall wear for the correction of an error, the nature and extent of which he admits he knows nothing about. An objective examination, such as is made by the skilled Optometrist or the physician, does not depend upon the reading of letters on a chart, but on the contrary, the Optometrist or the physician is able to take the most accurate measurements of the compound transparent medias of the eye. With the Ophthalmometer, he is able to measure the corneal curvature in its 360 meridians of the circle; with the Skiascope, he is able to determine the power of the optical medias of the eye; with the Phorometer, he can determine the tonicity of the muscles; and with such instruments as the Risely; Prism; Kratometer, and Myoculator, he is able to determine the duction power of each of the six motor muscles of the eye.

In the case of the correction of presbyopia (old sight), it is necessary that he determine the near point that will give clear and comfortable vision without injury to the eye. Again, in the case of presbyopia (old sight), the importance [fol. 65] of the correction of existing errors for distance cannot be over-estimated. The skilled practitioner recognizes the fact that the "correction for distance" forms the basic correction for the Presbyope. Herein lies a great mistake many people make who think they need but "magnifying glasses" for reading purposes only.

The skilled optometrist or the physician is likewise able to determine the tonicity of motor muscles and prescribe the necessary routine—ocular calisthenics—for the correction of heterotrophia and strabismus (crossed eyes).

Errors, as determined by the use of these scientific instruments today available, are correctable by the proper ophthalmic lenses which must necessarily be ground to prescription to neutralize the existing errors, and this must be done with the greatest of accuracy.

In the study of physics, we learn that lenses dominate rays of light and the types of ophthalmic lenses necessarily employed to correct some of these errors are exceedingly numerous. Some of the various types used are: Positive

spherical; negative spherical; prismatic; cylindrical; spherical-cylindrical; crystal; tinted; bifocal; trifocal; decentered; periscopic toric; punktal, etc., in fact, one can gain the proper prospective of the different kinds of ophthalmic lens combinations obtainable when we realize that there is said to be 3,144,072 different lens combinations available.

While errors of refraction today exist in 85% of all eyes and are so numerous and of varying nature, there are four distinct and outstanding errors; namely, Hyperopia; Myopia; Astigmatism; and Presbyopia, under which classification most errors come.

Hyperopia (Far Sight).—"That condition of refraction [fol. 66] in which the posterior principal focus of the eye lies back of the retinal plane, so that neutral light waves, instead of focussing on the retina, fall on the retina in diffusion circles of unfocussed waves. In other words, the focal length of the refracting system of the eye is greater than the antaro-posterior diameter of the eye-ball." (Atkinson's Unabridged Oculo-Refractive Cyclopedia and Dictionary.)

This simply means that the eye cannot focus rays of light upon the retina and remain in its comparative state of rest, but on the contrary must accommodate by exertion upon the ciliary muscles of the eye, creating a greater convexity upon the crystalline lens so that a clear image upon the retina can transmit a detailed picture to the brain for interpretation. This strain of abnormal accommodation creates an excessive drain upon the nervous system, and the greatest of accuracy, obtainable only thru the employment of scientific instruments by a skilled practitioner, can apply the exact corrective measure.

Myopia (Near Sight).—This type of error may give the sufferer no distress whatsoever except blurred vision for distance. Although often, like in the case of Hyperopia, the symptoms may be identical, the corrective measures are diametrically opposite.

The definition for myopia (near sight) is:

"That condition of refraction in which the posterior principal focus of the eye lies in front of the retinal plane, so that neutral light waves, instead of focussing on the

retina, come to a focus before they reach it, are reversed, and fall on the retina in diffusion circles of plus waves. In other words, the focal length of the refracting system of the eye is less than the antero-posterior diameter of the eyeball." (Atkinson's unabridged Oculo-Refractive Cyclopedia and Dictionary.)

The above definition, reduced to more simple terms, means that rays of light focussing upon the retina with the eye in its comparative state of rest will, without any ex- [fol. 67] ertion on the part of the accommodative process of the eye, focus these rays of light inside of infinity, or at some point inside of the accepted distance of twenty feet, at which point the focussing rays would theoretically cross and from that point distant objects would appear blurred and indistinct, and a Myope (near-sighted person) finds himself perfectly helpless, since the accommodative process is powerless to open this closed angle, thereby rendering the sufferer of this type of error helpless to view distant objects clearly.

Again, only scientific instruments in the hands of a skilled practitioner, employing both subjective and objective procedure, affords the only means of accurately determining the corrective measures for such existing errors.

Astigmatism: This is perhaps the most commonly misused term and often alluded to by the layman as being his type of ocular error.

Astigmatism may be of two distinct forms—Myopic Astigmatism and Hyperopic Astigmatism—which means in either case that its nature is "myopic" or "hyperopic," in common terms known as, "farsighted astigmatism" and "nearsighted astigmatism."

The definition of Astigmatism is as follows: "The word —astigmatism—literally means "without a point." It denotes a condition of the eye in which waves of light are not focussed at one point as in the normal eye, but at two separate focal points. This is due to the fact that the curvature of one of the refracting surfaces of the eye—usually the cornea, but sometimes the crystalline lens—instead of being spherical is paraboloid, i. e., made up of two different spherical curves intersecting each other at right angles; and each of these curvatures has its own set of focul points, those

[fol. 68] of the most convex curvature lying more anterior than those of the least convex. Under such conditions, it is evident, a clear retinal image cannot be obtained of any object, since the two acts of foci cannot be upon the retina at the same time. Hence, astigmatism is incompatible with clear vision." (Atkinson's Unabridged Oculo-Refractive Cyclopedia and Dictionary.)

It might be well to illustrate shortly just how the error or astigmatism, as above defined, reveals itself to one suffering from this error, and also how the error is properly corrected.

A person suffering from astigmatism may be able to see clearly all objects containing many vertical lines; that is the vertical lines may be clearly visible, while the horizontal lines are in varying degrees indistinct. This condition may obtain not only in rectangle meridians, but in the oblique meridians likewise—in fact, it may locate itself along any of 180 meridians of the circle.

An error of astigmatism uncorrected, therefore, illy develops the eye and causes a drain upon the nervous system in its effort to absorb the existing error, which error, if not too great, can partially be absorbed through a great tax upon the nervous system; while in greater degrees, the error cannot be absorbed and therefore forms distorted images on the retina, which are unacceptable to the brain, and then there develops other complications requiring great skill and judgment on the part of the practitioner in order to correct them.

The correction of astigmatism requires the most exacting scientific instruments of precision in the hands of the skilled practitioner, who alone can alleviate sufferers of this very common, yet greatly misunderstood, error of refraction.

[fol. 69] Presbyopia (Old Sight).—This is a condition that is visited upon nearly every person at the age of forty-five, wherein the crystalline lense of the eye undergoes a physiological change, causing the near point, or the nearest point at which the eye can focus, to recede.

The definition of Presbyopia is as follows:

"Presbyopia—literary the sight of old age. The term is used to denote that physiological state in which, by reason of the hardening of the crystalline lens, the individual

is no longer able to accommodate for his convenient near point." (Atkinson's Unabridged Oculo-Refractive Cyclopedia and Dictionary.)

In Presbyopia, there may be present, Myopia, or Astigmatism, the Presbyopia will also overtake eyes otherwise perfect. In any case, it is highly important that the correction of any existing errors for distance form the basic correction of a presbyopic error. It, therefore, naturally follows that the same care and skill is necessary in correcting presbyopia as is necessary in the correction of any other ocular error.

Accordingly, where refractive errors are found to exist in addition to presbyopia, a bifocal correction must be applied. This correction consists of a double lens, the upper portion of which corrects the existing error for distance, and the lower portion of which contains likewise the correction for the existing error for distance, together with the exact spherical strength added to give clear and comfortable vision at the near point or working distance.

Again, extreme skill by the practitioner is necessary to determine the exact correction of such errors, which are found only after a detailed examination by a skilled practitioner, is made.

[fol. 70] In the foregoing pages, I have pointed out only a few of the most outstanding errors commonly found in 85% of all eyes. I have outlined, in a limited way, the importance of the employment of both subjective and objective procedure under the direction of a skilled practitioner. It naturally follows, therefore, that if this conclusion is well founded, it is obviously impossible to correct errors of refraction by mail.

Out of all of the symptoms of distress described, the errors of refraction enumerated, and the various types of lenses necessarily employed in the proper correction of these errors, there is but two types of errors that mail order spectacle houses or merchants who sell ready-made glasses dare even hope to strike, the "one chance in a thousand" correction of an error.

Certainly, eye distress, demanding constitutional treatment, eye diseases requiring special treatment or surgical operation, errors of refraction, such as Myopia (near

sight), which is often progressive and requires constant observance of a skilled practitioner; Astigmatism, which obviously, because of the very nature of the error, requires the employment of instruments of precision in the hands of a skilled practitioner, could not hope to be in the category of errors to be corrected by mail.

I have stated above that in the case of hyperopia and presbyopia, the Mail Order Spectacle Houses or merchants selling ready-made glasses can hope to strike "one chance in a thousand" correction; the reason for this being in the case of hyperopia, the eye has a certain amount of reserve accommodation. Through action of the motor muscles, it likewise has "reserve fusion power."

[fol. 71] Since "positive" or "plus" lenses are required for the correction of Hyperopia, a "guess" of within one-fourth of a diopter of the error of refraction would permit the employment of the "reserve power" of the eye, and the keenness of vision would be experienced, a strain is visited upon the eye which the patient may not be aware of for a period of a few weeks and sometimes even months. The keenness of vision, obtainable through this "magnifying glass" and the imperceptability of any strain during the interim of the "trial period," causes the patient to consider himself properly fitted, and since the patient may be "over-corrected" or "under-corrected," he is illy corrected and, as time goes on, this error may develope into complications prompting the patient to consult a scientific practitioner, only to find that his "experiment" has led him beyond a margin of safety, and the accummulated neglect has amplified the seriousness of his predicament many fold.

In the case of presbyopia, the identical situation obtains, except with the following addition. The natural hardening of the crystalline lens, which sets in at the age of forty-five, requires the assistance of an Ophthalmic lense for work at close range; and the Mail Order Spectacle Houses, as well as the lay-spectacle peddler and merchant who sells ready-made glasses, attempt to fit the "presbyope" (far sight people) with plain "magnifying glasses" with which they presume to supplant this physiological loss of accommodation by "guess work."

In support of the above, I quote the following:

"Accommodation.—The power to adjust the eye to see within its far point. It takes place by contracting the ciliary muscles which encircle the lens and draws forward the choroid and hyaloid membrane, the suspensory ligaments becoming relaxed and the lens (by its own elasticity) [fol. 72] allowed to assume a greater convexity, especially its anterior surface, thus increasing its refraction. Amplitude of Accommodation (from Landolt) as follows:

Age in years	Amplitude (dioptres)
10	14
15	12
20	10
25	8.5
30	7.0
35	5.5
40	4.5
45	3.5
50	2.5
55	1.75
60	1.0
65	0.75
70	0.0

This is approximately correct, but individuals differ in the amount of accommodation they possess at the same age." (Lewis's Optical Dictionary and Encyclopedia.)

Again it will be noted that "guess work" with only "one chance in a thousand" of correctly correcting an optical error, it is reasonable to assume could be obtained.

One of the most highly important points in the fitting of an ophthalmic lens to the eye is that of concentration. It is positively essential that the lenses be perfectly centered in front of the pupil of the eye.

Lenses not properly ground by skilled workmen may *may* turn out to be "decentered lenses." Lenses placed in ill-fitting frames will likewise have the effect of a "decentered lens" and this great fault becomes a source of danger to the patient, owing to the fact that all lenses are made up of a

multiple of prisms, and by reason of this fact, the simplest sphere not properly centered may create a prismatic effect harmful to the eye, since prisms should never be worn by any person unless under the strictest supervision of a scientific practitioner.

Another danger, not wholly optical though presenting some measure of a source of danger, is that of an ill fitting [fol. 73] frame or mounting. Ill-fitting frames or mountings often bring on chronic irritation. Avoidance of chronic irritation is the first law to be observed in the prevention of cancer. Actual cancers from chronic irritation caused by ill-fitting spectacles or mountings are not unheard of.

In this age of efficiency, there is no demand made upon system of "guess work" devoid of scientific procedure. We demand efficiency in our schools, government, industries and all phases of civil life.

The visual efficiency of the school child is imperative, since not only does the child with defective vision sacrifice the pleasure and joy of keen vision, but it positively dominates the very course of the life of the child and in many instances in the past, it has been the making or breaking of a career.

In American History, we find Theodore Roosevelt the most outstanding example verifying the truth of the above statement.

In many states today physical examination of the school child is one of the entrance requirements.

The Department of Commerce at Washington, D. C., through Mr. Hoover, has very properly alarmed the entire country with his constant appeal to endeavor to eliminate waste in industry. A great economic loss is suffered where the visual efficiency of industrial employees is below par. As an individual the worker indeed sacrifices happiness and loss of his production capacity; and, likewise, the prevalence of the foregoing condition constitutes a huge loss to the industry and accounts for a measure of economic waste in industry.

Further, the most outstanding evidence of the need of visual efficiency can be found in the great number of motor [fol. 74] drivers, whose visual acuity is so slow that they constitute a source of danger to themselves, other motor-

ists, and pedestrians, causing a great loss of life and limb, injury and damage to property.

The foregoing clearly demonstrates the absolute necessity of eye examination by skilled practitioners and the elimination of the "guess work" necessarily employed in fitting glasses by mail, or through lay-agents, or merchants who sell ready-made spectacles.

The importance of the protection of the innocent and unsuspecting public against harm through incompetency of the practitioner or the dilatory promises of the spectacle fakir is brought quite forcibly to our attention when we discover that every state in the Union and every province of Canada, as well as many foreign countries, have prescribed minimum requirements for all practitioners wishing to practice upon the eye.

The laws in the various forty-eight states in the Union likewise prescribe a penalty for violation of the governing code and an important clause in many of these laws defined fraud and misrepresentation as a violation.

I wish to impress upon this Honorable Court the fact that the skilled practitioner must comply with certain minimum requirements prescribed by law, violation of which places his license in jeopardy, making him, in some instances, guilty of misdemeanor, and even gross misdemeanor, which situation affords the public ample recourse in case of malpractice.

In the case of the Mail Order Spectacle House, or the eyeglass peddler, or the merchant who sells ready-made glasses, they too deal with the element of the great public of the commonwealth finding themselves in distress, looking toward alleviation, and naturally seeking to take the [fol. 75] easiest and cheapest course. Find literature with misleading statements, promising unheard-of results and glorious futures for the sufferers, causes thousands to submit to the promises of the "magic cure" by the use of the famous "radium," "ex-ray," "sure-fit," and what not, kinds of lenses.

The Mail Order concern, the eye glass peddler, or the merchant selling ready-made glasses over his counter, on the other hand, right from the start limits its or his responsibility to a "money back" guarantee only, which the

skilled practitioner complying with all of the prescribed legal and ethical requirements, could not even hope to do. Again, the inconsistency is quite apparent.

Anyone fitting glasses by mail, or selling ready-made glasses over a counter, without the aid of professional skill, cannot help but be conscious of the fact that a full measure of proper relief has not been given to distressed eyes; and further anyone fitting glasses in such fashion is likewise aware of the fact that harm comes to distressed eyes illy fitted, and too often time is a factor, and great harm is visited upon eyes through misplaced confidence, alluring statements, and submission to that all-prevalent human weakness of price appeal.

I cannot conceive of a single instance wherein by mail or by the sale of ready-made glasses, the exact correction could be applied to an eye as a refractive error, and not to be termed "wildest" kind of "guess work."

The vision of the People of the State is of vital importance to the health program of the commonwealth and the unsuspecting, ill informed people should be protected from the exploitation of the materially inclined manufacturer of fake, or inferior grade of lenses.

Ernest H. Kiekenapp.

Sworn to before me this 8th day of October, 1928. Lucius A. Smith, Notary Public, Rice Co., Minnesota. Commission expires 7/9/33. (Notarial Certificate of District Court in Faribault on Oct. 8, 1928, by Alfred G. Thoneb, for Helen T. Sime.)

[fol. 76] In United States District Court

[Title omitted]

Affidavit of E. LeRoy Ryer

State of New York,
County of New York,
City of New York, ss:

E. LeRoy Ryer, being duly sworn, deposes and says: I reside in the State of New York. I am an optometrist duly licensed to practice my profession pursuant to the laws of

the State of New York and have been engaged in the practice of optometry for upwards of thirty-one (31) years.

I have read the affidavit of Mr. Martin L. Miller of the Pennsylvania Optical Company.

Mr. Miller in his assertion on page 2 of his affidavit states:

"nor was there any complaint at all from spectacle wearers that their vision was not being improved."

It seems to me that there must have been a very general and insistent complaint regarding this incompetent care of eyes to compel the legislatures of forty-eight respective states to enact laws to protect their people against "quack-[fol. 77] ery" and incompetent spectacle vendors.

There must have been an incessant complaint to cause six of the leading universities of the United States to establish professional courses in optometry. Such courses are given at the Universities of Columbia, Rochester, Ohio, Illinois, California and Southern California.

The second paragraph on page 2 of Mr. Miller's affidavit contains a gross misrepresentation and seems designed to perpetrate a fraud upon this Honorable Court. Mr. Miller contends that the spectacles sold are "spectacles with different strength of lenses." Ready-made glasses are supposed to contain lenses of equal strength in each eye. There seems to be an attempt to hide the fact that in ma-y persons both eyes are not equal in refractive power and require lenses of unequal strength. For the court's information I quote from Mr. Miller's own authority as follows:

Page- 203 and 204, Section 10, Text-Book of Ophthalmology by H. E. Fuchs, formerly of the University of Vienna:

"Anisometropia.—In anisometropia one eye may be emmetropic and the other myopic, hyperopic, or astigmatic, or both eyes may be ametropic, but in a different way or to a very different amount. In this regard all possible combinations occur.

Anisometropia not infrequently is congenital, and then, at least in the higher degrees of it, often manifests itself even upon external inspection by an asymmetrical formation of the face and of the skull. Acquired anisometropia

most infrequently originates from the circumstance that the change taking place in the refraction during life—that is, the decrease in the hyperopia or the development of a myopia—does not advance at the same pace in both eyes. The right eye usually has the higher refraction. Very high degrees of anisometropia develop when one eye is normal, but the other, in consequence of a cataract operation, has become very hyperopic.

A correction of anisometropia without the aid of glasses would be conceivable only as the result of an effort of the accommodation differing in the two eyes; but this the eyes [fol. 78] are incapable of doing, at least to any noteworth extent. Accordingly, the anisometrope never sees distinctly with both eyes at once. This, however, gives him so little inconvenience that many persons do not become aware of the fact that they are not seeing equally well with both eyes until the tests of vision which the physician institutes are made. Moreover, if the difference in the refraction is not too great, binocular vision is not disturbed by it. Both images, even though they are of unequal distinctness, are superimposed and made to coalesce. In the high degree of anisometropia, however, strabismus very frequently sets in. This may be either divergent or convergent, and is often alternating particularly when one eye is hyperopic, the other myopic (see S. 282). Anisometropia, particularly when of high degree is rather frequently associated with hyperphoria."

On page 3 of Mr. Miller's affidavit he says:

"Convex spherical lenses have different degrees of strength, that is, convexity. Their only use is to magnify objects to the eye."

This is a gross mistake. No lens, convex or concave, magnifies nor minifies the size of the image in an eye if it is placed properly before that eye. If a convex lense does so magnify it is wrong and possibly dangerous, because it is then in effect too strong and it is not well for anyone to become accustomed to too strong a lens. That too strong a lens is usually selected by the layman, if left to himself, is a most formidable argument against such practice.

Glaucoma, cataract, optic neuritis, Bright's disease, diabetes, high blood pressure and many other abnormal con-

ditions may be discovered by an ophthalmoscopic examination of the eye and are discovered by the optometrist or the physician in his routine examination. Such cases are referred by him to the patient's physician for treatment of the systemic condition.

Convex lenses may have no direct effect on these abnormal conditions, or indeed, convex lenses even with these conditions present may help those eyes to see better but if such lenses are bought over the counter where no com- [fol. 79] plete examination of the eyes is made, these conditions are overlooked, sometimes at fearful cost.

The lenses are then not to blame. The blame lies with the one who supplies such lenses in an attempt to give temporary visual help, inducing delay without uncovering the dangerous underlying diseased condition.

In glaucoma, perhaps the most dreaded ocular diseas, central vision may be normal and the patient read as usual while the outer fields of the eye may be blind. Thorough examination before the simplest lenses are prescribed or used insures the people of the state at relatively low professional cost against such dangers.

Mr. Miller on page 5 of his affidavit quotes from Anomalies of Refraction and of the Muscles of the Eye by F. B. Tiffany and refers this Honorable Court to page 215. But it is interesting for this court to know what Mr. Miller's authority had to say in the very preface of his book which I now quote:

Preface

"In no branch of medicine or surgery within the last decade has there been more attention given or more discoveries or advancements made than in the department of ophthalmology; particularly, the anomalies and effections of the ocular muscles and of refraction; and yet, these vast subjects of heterophoria and ametropia are still wrapped in a halo of uncertainties. That some anomaly of the ocular muscles, of refraction, or of both, is accountable for many of the pains, aches, and ills of the body and for many of the different forms of chorea and hysteria, is being more and more recognized by the profession in general.

In no branch of medicine have there been invented so many instruments and apparati for the disclosure of disease as for those anomalies and affections which are incident to this little organ of vision; and in no branch of the science, it would seem, is it so necessary that a settled and definite plan be adhered to in the ferreting out of these occult affections and complications as in ophthalmology. • • •

[fol. 80] "It is said that the inmates of insance asylums, homes for the feeble-minded, and prisons are, with few exceptions, either ametropic or heterophoric. It would seem, then, that these anomalies may bear some intimate relation to man's moral nature. The manner and degree in which a ray of light is bent from its course as it passes through the different dioptric media, together with the beautiful and complete mechanism of accommodation which enables the eye to receive these impressions, whether they come from near or afar, has much to do with man's correct estimate of the material world about him.

That the faculty of vision shapes largely the destiny of man, warps or fashions his fate or his moral nature, there is little doubt. • • •"

Mr. Miller in quoting Tiffany for some reason or other stops at page 215. Perhaps he did not want this Honorable Court to really understand Tiffany, who is one of the old recognized authorities, but had he continued in his quotation and directed this court's attention to page 218 and 219 the truth would have manifested itself. I refer this court to page 218 and 219 of this same authority for the following quotations:

Page 218:

"Glasses should not be selected in a haphazard way by the person himself or by the untutored dealer in spectacles; more especially by dry goods merchants and jewelers."

Page 219:

The age of a person is not necessarily an index of the strength of glass to be prescribed, and the "Smart Aleck" who claims to be able to hand out the proper glass once knowing the age is very liable to give the wrong glass. Presbyopia with hyperopia, as we have already said, re-

quires a much stronger glass than the same aged emmetrope with presbyopia. The myope of a slight degree with presbyopia would not require so strong a glass as even the emmetrope, nor would a spherical glass meet the exigencies of the case when there is astigmatism combined with the presbyopia.

Especially is it necessary that the person beginning the use of glasses have his eyes carefully tested by a skilled oculist, and start out with the proper glass to meet the exigencies of the case."

It is quite evident from the above quotations that this [fol. 81] Honorable Court should be satisfied that the very authority quoted by Mr. Miller in his affidavit did not believe in simply letting the patient pick out his own glasses, but on the contrary did believe as stated on page 218 that:

"Glasses should not be selected in a haphazard way by the person himself or by the untutored dealer in spectacles, more especially by dry goods merchants and jewelers."

Mr. Miller in his affidavit quote Fuchs, whose authority is great throughout the world, but he isolates two paragraphs from 955 pages. Of these, 89 pages (from 137 to 225) are devoted to "Anomalies of Refraction and Accommodation" and 167 pages (from 229 to 395) "Sensory and Motor Functions and Derangements and Examination of the Eye."

Mr. Miller in quoting Fuchs leaves out a very significant part of the very sentence he quotes on page 179. Beginning with the word "glass" at the end of the quotation in Mr. Miller's affidavit, we find that Fuchs continues to say:

"The strength of this will depend on a number of considerations which will receive detailed discussion later."

As long as Mr. Miller is so prone to rely upon the authority of Fuchs, I direct this court's attention to Mr. Miller's authority on page 205 as follows:

"Scope and Routine of Examination—In determining the refraction of the eye we must combine both subjective and objective tests and at the same time make a general exami-

nation of the patient, learning all we can about his symptoms, his physical condition, and his temperament, and determining his accommodation, motility, and the exterior and interior condition of the eye. From all these factors we shall decide as to the significance of the refractive findings and thus determine whether glasses should be prescribed, and, if so, what they should be, and also determine what other means besides glasses should be applied.

[fol. 82] It is best to follow a definite routine in the examination. A good order is as follows:

1. Taking the history and determination of the glass the patient has been wearing (see S. 158).

2. General inspection of patient. Examination of exterior of eye (SS. 386-393).

3. Determination of the vision of each eye separately and together (SS. 185-187).

4. Examination of refracting media and of fundus with ophthalmoscope (SS. 397 et seq.).

(If case seems to be obviously one of refractive trouble, this examination may be deferred till after the next step).

5. Subjective examination of refraction (preceded, if desired by a determination of the corneal astigmatism with the ophthalmometer). This combined with (a) examination of accommodation and determination of reading glasses (S. 215); (b) examination of motility (subjective and objective tests; (SS. 302-310).

6. Subjective and objective examination under cycloplegia (SS. 217, 219-223).

7. Postcycloplegic tests (S. 218)."

On page 209, Fuchs, Mr. Miller's authority says:

"Testing the Accommodation; Reading Tests—The accommodation should be tested in every case of refraction. The test with the rule and card should be made for each eye separately and then for both eyes together with the glasses found. If on repeated tests the accommodation is found to be below the normal limit for the age (S. 182), there must either be a corresponding amount of latent refractive error or the accommodation must be actually subnormal. Such deficiency in accommodation may itself be the cause of the symptoms which had been ascribed to the refractive error and had not been relieved by its correction."

And on page 219, the same authority says the following: "It will be seen that the determination of the proper reading glass in presbyopia requires much care and patience. First the full correction for distance must be determined accurately. Then the patient wearing this correction is placed as nearly as can be under his normal working conditions and with his work at the habitual distance. Then different convex glasses are added to the distance correction until an addition is found that gives the most serviceable and comfortable (which is not always the sharpest) vision. With each addition it is well to determine the near point and corresponding amount of accommodation with the accommodation card. As stated above the correction will vary greatly with circumstances, but, as a rule, except in the younger presbyopes with a range of 2 or 3 D, a glass [fol. 83] which brings the near point within 28 cm. (over 3, 5 D) is not well borne, and, other things being equal, the glass that gives the widest and most serviceable range of vision is the best. This should be determined by a sufficiently lengthy trial. A glass, which seems comfortable at first may after a few minutes give a sense of pull or strain above or in the eyes. This is usually a sign that the glass is too strong. Sometimes the accommodation test shows a constant difference in the maximum accommodative power of the two eyes, and in that case it may prove best to make a somewhat stronger addition for reading in one eye than in the other (see S. 383). Whether this is so or not must be determined by trial."

And on page 223 of Fuchs, Mr. Miller's authority, we find the following:

"In the large majority of cases of anisometropia the patient will readily tolerate and find satisfaction in glasses fully correcting each eye, even when the difference in refraction is very great. There may be a period of temporary discomfort but even this is absent in many cases, and the final outcome is more satisfactory than when an incomplete correction is used. Moreover, by the use of this full correction combined with exercise of the poorer-sighted eye, the vision of the latter may be materially improved. In anisometropia it is particularly important that the glasses should be so centered as to produce the minimum of

prismatic deviation. When the patient will not bear the correction applied to both eyes we correct the better eye and put a plane glass before the eye.

In many cases the obstacle that opposes our attempts at correction of both eyes is a muscular error. This produces diplopia, which, as long as the image of one eye is indistinct, is not obtrusive and hence can be neglected, but which becomes annoying as soon as both images are made clear by the use of correcting glasses. In a few cases the trouble lies in the unequal prismatic effect of the unequally strong glasses. This causes diplopia when the patient looks through the periphery of the glasses and can generally be obviated by careful adjustment."

And on page 364, of Mr. Fuchs, Mr. Miller's authority, we find the following:

"Unequal Accommodation—We sometimes find the accommodation unequal in the two eyes. Sometimes this is due to the fact that the ciliary muscle is weaker in one eye [fol. 84] than in the other. This occurs frequently in ophthalmoplegia interior due to syphilis, tables, traumatism, or poisons. It can be readily understood that these conditions may affect one eye more than the other, or may affect one to the exclusion of the other. Since in these cases the sphincter iridis and the ciliary muscle are usually affected simultaneously, the inequality in accommodation is generally associated with inequality of the pupils—the eye with weaker ciliary muscle having the larger pupil.

When not due to the causes above mentioned, unequal accommodation is usually not associated with inequality of the pupils. In this case, too, it may be caused by unequal action of the ciliary muscle, but most of the cases of this sort seem to be due to an unequal rigidity of the lenses in the two eyes. In other words, it is a form of presbyopia in which the sclerosis of the lens has advanced faster in one eye than in the other. It produces no symptoms until the accommodation in one eye or the other has sunk so low as to require the addition of a glass for near work. When this occurs, it is important to take account of the inequality and to determine by experiment whether we shall or shall not make an unequal addition for reading to the distance

correction. In some cases such unequal addition is quite helpful (see S. 215)."

And on page 365 of Fuch, Mr. Miller's authority, we find the following:

Examination of the Eye

"General Routine of Examination; History Taking—In examining an eye patient a systematic routine should be followed, to be elastically varied according to the exigencies of the case. Such a routine should include—

1. Getting the history of the case.

2. Examination of the vision and refraction (Chapter XV).

3. Examination of function (color sense, light sense, field; see Chapter XVI.)

4. Examination of the motility (S. 309).

5. Objective examination of the eye.

In taking the history inquiry should be made for the various symptoms such as increased secretion, or other evidences of ocular inflammation, pain, asthenopia, headache, vertigo, blurred vision, diplopia, metamorphopsia, head-tilting, etc., likely to occur in eye disease (SS. 104-112) and also for any of the possible causes (SS. 83-103). Furthermore, it is important to get the family history, so as to ascertain the presence of any hereditary tendency or disease.

In making the examination too much stress cannot be laid upon the necessity of proceeding systematically since [fol. 85] otherwise matters of importance may very readily be overlooked. We first, therefore, take a survey of the patient's appearance in general, his attitude, the way he carries his head, and the expression of his eyes and countenance; then we examine the eyes themselves, and in so doing proceed successively from the superficial parts—lids, conjunctiva, and cornea—to the deeper portions.

The record of a case, while as condensed as possible, should omit no essential fact. In this regard the statement that conditions are normal is often as important as the presentation of abnormalities. A well-devised system of abbreviations saves space and time and helps greatly.

It is important to form the habit of making sketches,

however diagrammatic, of the conditions presented. A comparison of such sketches made at different times will show, for example, the advance of a cataract, the enlargement of a conus in progressive myopia, the presence of a hemorrhage or pigment spot where one did not exist before, etc."

Scientific examinations of the human eye are absolutely essential to the protection of the vision of the people of the state. Records should be kept, as all professionals do keep them, for if a record is kept of the results of each examination of an eye it is obvious how valuable these record books are as they accumulate in order that deductions may be made from the patient's past as to the possible course of the future for the benefit of that patient.

On page 6 of Mr. Miller's affidavit he quotes Hartridge on Refraction, by Gustavus Hartridge. He limits his quotations to the following appearing on page 185 of the Eighth Edition:

"The treatment of presbyopia consists in prescribing convex spectacles for reading and near work, so as to bring back the near point to a convenient distance."

But Mr. Miller's evidence does not want this Honorable Court to know what this very eminent authority had to say just two pages beyond the above quotation. This court ought to know what this authority had to say on page 187, [fol. 86] which I quote as follows:

"Before ordering glasses for presbyopia, it is necessary to try the patient's distant vision, so that any hypermetropia or myopia may be recognized. If hypermetropia exist, the amount must be added to the presbyopic glass; if myopia, it must be subtracted. Thus a patient with hypermetropia requiring 2 D. for its correction, at the age of forty-five will require 3 D. for reading (H. 2 D. Pr. 1 D. = 3 D.)."

And this same Hartridge, another of Mr. Miller's authorities on page 231 of the Eighth Edition says the following:

"First, notice the general appearance of the patient, then the shape of the head and face. Next the eyes, as to

whether they are large and prominent, or small and sunken-looking. Listen patiently to the suffer's complaints, and having submitted to this ordeal, test the acuteness of vision of each eye separately, and afterwards together, writing down the result, remembering always to commence with convex glasses. Then place the near type in the patient's hand, noting the number of the type and the distance at which it can be read. Next pass on to the ophthalmoscope, first applying the "retinoscopic test," then the "indirect examination," and finally the "direct method," first at a distance, and then close to the eye. If any ametropia exist, the advisability of paralysing the accommodation with atropine must be considered."

Mr. Miller failed to inform this court that the very same Hartridge in his later Sixteenth Edition on page 196 says the following:

"Before ordering glasses for presbyopia, always try the patient's distant vision, so that any hypermetropia or myopia may be recognized. If hypermetropia exist, the amount must be added to the presbyopic glass; if myopia, it must be subtracted. Thus a patient with hypermetropia requiring 2 D. for its correction, at the age of forty-five will require 3 D. for reading (H. 2 D. Pr. 1 D. = 3 D.)."

And on page 252 Hartridge says the following:

"Commence the examination in a systematic manner. First, notice the general appearance of the patient, then the shape of the head and face; next the eyes, as to whether they are large and prominent, or small and sunken-looking. [fol. 87] Listen patiently to the sufferer's complaints, and having submitted to this ordeal, test the acuteness of vision of each eye separately, and afterwards together, writing down the result, remembering always to commence with convex glasses. Then place the near type in the patient's hand, noting the number of the type and the distance at which it can be read. Next pass on to the ophthalmoscope, first applying the "retinoscopic test," then the "indirect examination," and finally the "direct method," first at a distance, and then close to the eye. If any ametropia exist, the advisability of paralysing the accommodation with a mydriatic must be considered."

Now, let us turn to the affidavit of Walter DeYoung of the American Spectacle Co., which company specializes in readymade spectacles.

I have already shown in my reply to Mr. Miller that while patients sometimes do not make a complaint to the storekeeper, he either goes to a duly licensed physician or optometrist, and this is because the harm done by ready-made glasses is not always evident to the patient, but glaucoma, cataract, etc., may remain undiscovered in its incipient stages when no thorough examination is made before glasses are prescribed.

It is absolutely essential that only a duly licensed physician or optometrist be authorized to refract the human eye because a thorough preliminary examination of every part of the eye should be made before it is safe to say that glasses, even convex spherical glasses as are sold over merchandise counters, are all that are needed. It may be easy to say that a 1D or a 2D convex spherical is needed in order to see a certain size type, but it requires skill that an optometrist or the physician obtains only by education and training and much practical experience to state correctly that this is all that is needed in any given case.

[fol. 88] Mr. DeYoung's affidavit concedes the uncertainty and irregularity with which an eye changes, and all science has proved, that when the layman adopts the habit of selecting his own glasses he waits until he cannot see with his former ones, or, in other words, until the eyes have used up all their reserve strength and broken down before he seeks a change. This, of course, is the wrong time to first seek a change and a bad time at which to select glasses haphazardly. It is equivalent to waiting for a tooth to ache before seeking the aid of a dentist. The tooth nerve causes pain, the optic nerve, unfortunately, cannot cause pain. The optometrist or the physician by making regular periodic examinations discovers and corrects changes in refraction in the incipient stages and any extra cost involved for professional services is valuable insurance toward conserving the eyesight of the individual involved.

On page 6 of Mr. DeYoung's affidavit he frequently admits that the difference in price of ready-made glasses does not indicate a difference in the lenses, but only a difference in the size (diameter) of the lense and the style of the

frames. I most respectfully refer this court to pages 269, 270 and 271 of "Anomalies of Refraction and of the Muscles of the Eye" by Tiffany to indicate how very vital and important it is to obtain the correct size of the lense. Tiffany, pages 269, 270 and 271.

Spectacles

"Under the head of spectacles I wish to call especial attention to the different forms of eyeglasses, and to the necessity of a perfect fit as to size, form, and style, as well as to the adjustment to the nose and face. In selecting glasses, it is a great necessity that they be secured to correct not only the errors of refraction, but also the anomalies of the extrinsic muscles. The oculist ferrets out the anomaly, prescribes the glasses with measurements as to size and style of frames, etc., and the optician should see that the [fol. 89] mechanical part is perfectly done, and that the prescription is accurately filled; for if the glasses are not properly adjusted, they will not accomplish what is expected of them, and may even prove injurious. It is the optician's business, first, to see that the glass has its principal axis in its center (Fig. 161), for if the axis is eccentric, as shown in Fig. 162, bringing the center of such a glass opposite the pupil would not bring its optical center into the visual axis. The optician then should see that the glass is truly centered and that the center of each glass is opposite the pupil of the corresponding eye. (Figs. 163 and 164).

If the frames are too large, too small, or are not properly poised, but are tilted, as in Figs. 165 and 166, or decentered, as in Figs. 167, 168, 169, the eye does not look through the center of the glass, but some other part. This produces the effect of a prism, and inordinately taxes certain muscles provoking asthenopic symptoms. Care must be taken also that the glasses are properly poised on the nose, at the right height and distance from the eyes. If they are too high, the person looks through the lower edge, or goes with head bowed; or if they are set too low, he must look through the upper edge or go with head thrown back. If the glasses are set too near, the lashes are constantly striking them. A concave glass should be placed as near the eye as possible

without interfering with the lashes; if not, the peripheral rays will not enter the pupil, and hence the retinal image will be smaller. The converse of this holds true with a convex glass, for the further away the lens is (up to a certain limit), the more convergent the rays come to the eye and more will enter the pupil, and brighter and larger will be the image. If they are too far, the distance changes their focal power.

Great care should be taken in selecting the saddle, or nose-piece. See that it not only fits the nose, but carries the glasses at the proper height and distance from the eyes. If the saddle is too narrow and pinches the nose, it may provoke disease of the lachrymal apparatus. The size and style of the glass must be selected to suit the individual features.

In taking the measurement of the spectacles, the pupillary distance is the principal consideration, and next to that in importance is the selection of the saddle or nose-piece. People with a low or flat nose-bridge are not able to wear a pince nez. The glasses for distant objects should set higher than those for near objects. Reading glasses should be in such a position as to permit seeing through the center without bowing the head, but merely lowering the eyes or directing the eye to an angle of 45° when the head is erect."

[fol. 90] It must be conceded that merchants selling ready-made eyeglasses or mail order houses engaged in a similar business do not use trial cases. If these merchants were to use trial cases it would bring them within the definition of the practice of optometry, and they could be prosecuted for the illegal practice of a profession, provided they did not employ an optometrist or a physician. It is utterly impossible to fit or adjust proper lenses to the human eye without suitable tests being made by way of examination. No examination is complete unless it is both subjective and objective. How do these merchants or mail order houses make objective examinations with the ophthalmometer, the retinoscope and slit-lamp? Chain stores, merchants, mail order houses and the like do not employ any of these scientific appliances, because the law prevents their use by any person not a duly licensed physician or a duly licensed optometrist.

It is utterly impossible for chain stores, merchants and the like to test the acuteness of vision of each eye separately, or, if tested for and found, to correct it with ready-made equally-powered glasses.

The argument advanced that the patient may not need expensive frames is certainly true but he needs accurately fitted frames and the optometrist or the oculist, by his training, insists on the frame being correct to within one millimeter. The correct size of frame, as well as the nose-piece being in the proper position, is just as vital and important as is the correct size and quality of the lens itself.

On page 10 of Mr. DeYoung's affidavit he makes a very unfair statement relative to the use of scientific apparatus. Most scientific apparatus, as used by the optometrist or by the oculist, is to make sure that no insidiously dangerous pathologic condition lurks in the eye before an attempt is [fol. 91] made to apply any lens, even the simplest convex lens.

All scientific authority recognizes the progress made by the profession of optometry during the last twenty years, and to permit any and everybody to engage in this practice would be comparable to going back to the time when every barber was a surgeon.

E. Le Roy Ryer.

Sworn to before me this 18 day of October, 1928. Herbert H. Roth, Notary Public Bronx County. Bronx Co. Clk's No. 167, Reg. No. —. N. Y. Co. Clk's No. 919, Reg. No. —. King's Co. Clk's No. 119, Reg. No. —. Commission expires March 30, 1929.

[fol. 92] In United States District Court

[Title omitted]

Affidavit of Henry S. Manley

State of New York,
County of New York,
City of New York, ss:

Henry S. Manley, being duly sworn, deposes and says: I am Assistant Attorney General of the State of New York.

I am assigned by the Attorney General to the defense of this litigation acting under the direction of the Solicitor General, C. T. Dawes.

On or about August 23, 1928, and before this litigation had commenced, the Attorney General received from Seligsberg & Lewis, attorneys for the plaintiff a letter dated August 22, 1928 as follows:

August 22, 1928.

"Hon. Albert Ottinger, Attorney General, Albany, New York.

My Dear General Ottinger: My firm has been retained to test the constitutionality of Chapter 379 of the Laws of [fol. 93] 1928, which becomes effective September 1, 1928. We intend to file our bill in equity by the end of this week, but surely not later than the 28th instant. The bill will be accompanied by affidavits on a motion for an injunction. The motion will have no return date, because the District Judge to whom we present the motion papers will have to convene Statutory Court and then fix a date for hearing. We are anxious to avoid, if possible, the question of procuring a restraining order pending the determination of the motion, because that would involve bringing in probably a dozen suits on behalf of all of the companies which sell spectacles over the counter in New York City, such as the W. T. Grant Company, the Kresge Company, Metropolitan Chain Stores, Woolworth, and others. The papers in all the suits would be identical.

We should like, if possible, to have your assurance that steps will not be taken to enforce the law against the firms we represent pending the determination of the motion as long as the motion is pressed with vigor. You may rely upon the fact that the motion will be pressed.

The chain stores which I have mentioned have many thousands of dollars invested in their optical departments and they cannot afford the unpleasant notoriety of arrest and prosecution, while they are taking immediate steps to test the law. It seems to me that it would aid in the administration of justice if you could assure us that steps will not be taken to enforce the law pending the determination of its constitutionality provided, as I have said, that

our motion is pressed. I shall be greatly obliged if you will advise me of your attitude in the matter.

Thanking you in advance, I am

Yours respectfully, Clarence M. Lewis.

CWL:WC.

Mr. Dawes replied by Western Union telegram dated August 24, 1928 as follows:

August 24, 1928.

"To Clarence M. Lewis, Street and No. 43 Cedar Street, Place New York City:

In view of the action which you have instituted to de-
[fol. 94] **termine the constitutionality of chapter three hundred seventy nine of the laws of nineteen twenty-eight this office and the Department of Education will not engage in activities to enforce the same without reasonable notice to you that we intend to do so."**

C. T. Dawes, Solicitor General."

(Official.)

It was intended by the non-action of the Attorney General for a short time after September 1, 1928 to relieve the plaintiff from the necessity of procuring an ex parte restraining order and thus requiring the early meeting of a statutory court under the provisions of Judicial Code, Section 266. This is the only reason why no prosecutions have thus far been commenced. The reason for non-action is now passed; we are informed that the education department desires that the law be enforced; and it is the intention of the Attorney General to enforce the law unless he is restrained from such enforcement.

It is respectfully submitted by the Attorney General that no temporary injunction should issue.

Henry S. Manley.

Sworn to before me this 17 day of October, 1928. Herbert H. Roth, Notary Public, Bronx County. Bronx Co. Clk's No. 167, Reg. No. —. N. Y. Co. Clk's No. 919, Reg. No. —. King's Co. Clk's No. 119, Reg. No. 9417. Commission expires March 30, 1929.

[fol. 95] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF EDMUND F. COOKE

STATE OF NEW YORK,
City of New York,
County of Erie, ss:

Edmund F. Cooke, being duly sworn, deposes and says, I reside at Alden, New York.

I have been a member of the State Legislature for a few years, and during the Legislature Session of 1928, I introduced in the Assembly a bill which subsequently became Chapter 379 of the Laws of 1928. After listening to various representatives of the Optometric and Medical professions, and after reading voluminous reports of many organizations, such as the Eye Sight Conservation Council of America, Associations for the Blind, Health Agencies and professional societies, I introduced the law in question, for the following reasons:

The exploitation of the public by concerns offering to fit glasses by mail or over a merchandise counter should be stopped. It is unfortunate that a portion of the public are [fol. 96] so gullible as to need protection against an evil of this nature, but the public does need to be protected against the operations of fakers who have no sense of honor and whose one object is financial gain even though the individual imposed upon endangers his sight—a far more important consideration than the loss of a small sum of money paid for inferior and worthless articles, which may be working serious damage to the unsuspecting victim.

An offer to fit glasses by mail or over a merchandise counter is a dishonest offer because it purports to do that which is impossible. In the first place, no person is capable of determining, without the aid of science, what glass or glasses are suitable for the correction of a defect of refraction, and no mechanical device has ever been invented which will enable the unskilled to correctly fit themselves to glasses.

It is not complimentary to the intelligence of any individual for him to assume the possibility of glasses being fitted to his eyes, other than by the personal attendance of

one skilled in the science of measuring the eye to determine defects of vision. Nevertheless, many credulous people are being imposed upon, and there should be some way of protecting those who are being exploited against these dishonest practices of firms, offering to fit glasses by mail or over a merchandise counter.

In the introduction of this legislation, it was my purpose to condemn such practices and to close the mails to the use of those offering to fit glasses by mail, and to protect the public against the eyeglass peddler, vender and merchant. The advertising matter of these concerns is very plausibly written with the deliberate attempt to deceive and ensnare [fol. 97] the ignorant, and these concerns have been shrewd enough to keep within the letter of the law, although their practice has been actually dishonest and fraught with consequences actually dangerous to those they dupe.

I felt then and I feel now that this sort of business cannot be condemned too severely, and I introduced the bill because of an apparent widespread demand for such legislation.

Edmund F. Cooke.

Sworn to before me this 18th day of October, 1928.
M. Helen Weiss, Notary Public, Genesee Co.
(Seal.)

[fol. 98] In United States District Court, Southern District of New York

D. S. Kresge Company, Complainant,
against
Albert Ottinger, Attorney General of the State of New York, and Joab H. Banton, District Attorney of New York County, et al., Defendants

William Roschen, Complainant,
against
Albert Ottinger, Attorney General of the State of New York, and Joab H. Banton, District Attorney of New York County, et al., Defendants

Before Augustus N. Hand, Circuit Judge, and John C. Knox and Frank J. Coleman, District Judges

I. Maurice Wormser and W. N. Seligsberg, Solicitors and Counsel for Complainants.

Albert Ottinger, Attorney General of the State of New York, for Defendants; Henry S. Manley, Counsel.

OPINION

AUGUSTUS N. HAND, Circuit Judge:

The above suits are brought by dealers in eyeglasses to enjoin the enforcement of Chapter 379 of the Laws of 1928, amending the Education Law so that two of its sections shall read as follows:

[fol. 99] "Sec. 1432-a. Sales of eyeglasses, spectacles and lenses at retail. It shall be unlawful for any person, firm, or corporation to sell, at retail, as merchandise, in any store or established place of business in the state, any spectacles, eyeglasses, or lenses for the correction of vision, unless a duly licensed physician or duly qualified optometrist, certified under this article be in charge of and personal attendance at the booth, counter or place, where such articles are sold in such store or established place of business. The peddling of spectacles, eyeglasses or lenses from house to house or on the streets or highways, by a person other than such an optometrist or physician, also shall be unlawful, notwithstanding any law providing for licensing peddlers."

"Sec. 1434. Construction of article. Nothing in this article shall be construed to apply to duly licensed physicians authorized to practice medicine under the laws of the state of New York nor to the sale of toy glasses, goggles consisting of plano white or plano colored lenses or ordinary colored glasses, nor to persons who sell spectacles, eyeglasses or lenses only on prescription from such physicians or from such duly qualified optometrists or who duplicate broken lenses."

Section 1433 of the Education Law of the State makes any violation of the provisions of Article 54 relating to optometry a misdemeanor and subjects offenders against it to fine and imprisonment and to the imposition of penalties.

Section 1433 of the Education Law also charges the Attorney General of the State with the collection of penalties and the prosecution of offenders against the act in question. There seems to be no provisions of the statute au-

thorizing enforcement of the act by the District Attorney of New York County or by the Board of Optometry Examiners who are made parties-defendant as well as the Attorney General.

In accordance with the practice established by statute (Federal Code Sec. 266) the complainant in each case has moved for a preliminary injunction and orders have been [fol. 100] signed convening this Statutory Court. In the Roschen case the motion is made upon the complaint and the adffiavits of Miller and DeYoung, and in the Kresge case the motion is made upon the complaint and the affidavits filed in the other case.

The Kresge Company alleges in its complaint that it has 50 stores in the State of New York, at which spectacles are sold over the counter, that its employes do not examine the eyes of customers or prescribe treatment for them, or diagnose any eye troubles, that it offers a selection of spectacles with convex spherical lenses which are mere magnifying glasses and do not injure the sight in any way; that customers come in and try on glasses until they find what helps them.

The Kresge Company also alleges "that it would not be possible for it to continue the sale and trading in spectacles in its stores if plaintiff were required to employ a duly qualified optometrist or a physician to be in charge of the counter at which plaintiff sells spectacles. The cost of hiring such a person in each of plaintiff's stores would far exceed not only plaintiff's profit from the sale of spectacles in each year, but would exceed plaintiff's entire income for the year from the sale of spectacles, and if plaintiff be required to place a duly licensed physician or a duly qualified optometrist in charge of each counter in each of its stores at which spectacles are sold, plaintiff would be compelled to cease and abandon the sale of spectacles in its stores."

[fol. 101] Roschen makes similar allegations in his complaint except that he had one instead of many stores.

The moving affidavits are made by men in the business of manufacturing and selling eyeglasses who are not optometrists. They set forth that between 500,000 and 600,000 pairs of spectacles with convex lenses are sold in New York

annually over the counter at from 10 cents to $1.00 a pair and that many people after forty years of age require spectacles from physical changes in the eyes due to age, that there are estimated to be 5,000 places in New York where spectacles are sold over the counter, whereas there are only 1,850 registered optometrists in the State; that many communities in the State remote from cities have no optometrist, nor have sufficient business to maintain one, and if people in rural communities cannot purchase glasses at a general store or drug store many who have reached the age of presbyopia will have to go without anything to relieve their poor sight. It is further stated that most people requiring spectacles need nothing but convex spherical lenses selected by themselves and poor people cannot afford to add to the cost of their glasses the optometrist's charge for services.

The defendants have presented affidavits by professional optometrists. They are to the effect that the proper way to relieve defective sight is not by the crude method of the selection by the person desiring glasses of lenses having magnifying power. The right and left eye of every individual is likely to be different but even though in the case of old sight both eyes are substantially alike and each eye needs a magnifying lens yet the adjustment of the lenses can only be adequately made after careful examination [fol. 102] and measurement by a man of scientific training. Furthermore, this examination of eyes, the sight of which is defective, detects both diseases of the eyes and general pathological conditions as well. Moreover, far sight, near sight and astigmatism are all common conditions and require corrective measures, and the last especially. A mere magnifying spectacle even if it crudely compensates the changes in the lens which normally come with age does not correct existing errors for distance and focus which may otherwise be present.

We do not understand that it is disputed by complainants that a more certain and scientific adjustment of spectacles and a more complete correction of poor eyesight may be obtained when the lenses are prescribed and fitted by a registered optometrist than when selected from a mass of different spectacles by the customer himself without any aid. But they say in the first place that the former method

is expensive, unavailable to persons in rural districts and unnecessary in most cases, and in the second place that the statute does not command the optometrist who is required to be in charge of the place where the spectacles are sold to do anything whatever.

In respect to the first contention, it might equally have been made as an objection to requiring a license to practice medicine. There are some remote localities even now that might be better off if persons having some experience in nursing were allowed to practice medicine than to be compelled in many cases to go without medical treatment because physicians are unavailable. Yet the legislature has regarded the temptation to use makeshift remedies and em- [fol. 103] ploy quacks as so strong and the results in general as so bad, that it has rigorously prohibited the practice of medicine except by licensed physicians. The same thing is true of law practice and the hardship of being compelled to employ men educated at large expense where in some cases self-taught practitioners who had never been admitted to the bar might have answered the purpose as well, is no answer to the requirement.

The second contention is the one on which complainants really rely. They contend that the New York Act violates the due process clause of the Fourteenth Amendment of the Federal Constitution because it has no substantial relation to the public health, safety and welfare and, therefore, is not within the unclassified residue of legislative power of the State known as the police power.

But can it be justly said that an optometrist who is "in charge of and (in) personal attendance at the place where" spectacles "are sold" would not substantially remedy the existing evils of haphazard selection of eyeglasses? Can it be argued that the licensing of physicians is illegal because no law requires a sick man to employ a doctor? Or may it be said that laws for fire escapes or rear vision mirrors on trucks, or life preservers and life boats on vessels, are unconstitutional because they contain no directions that they be used by the tenants, drivers or passengers. To render an optometrist available wherever eyeglasses are sold is certainly a long step toward correcting existing evils. What can the words "in charge of" mean except to manage the business of selling spectacles to customers?

[fol. 104] It seems to us that the inevitable tendency would be for customers to consult him and for a reputable optometrist to furnish assistance and advice as to their needs. If the effect of the new requirement should finally be to render the sale of a standardized product unprofitable so that the customers in the end would not purchase it but would have their eyes carefully tested and their glasses made according to special prescriptions, it cannot be said that the result might not on the whole be desirable. At any rate, whatever the result to the business of selling a standardized product, the correction of certain manifest evils was within the legislative power and the means adopted seem to have been reasonably calculated to promote the public health and safety.

A Minnesota Statute provides that:

"No person shall hereafter carry on, conduct, or transact business under a name which contains as a part thereof, the words drugs, drug store or pharmacy * * * unless the place of business so conducted be at all times in charge of a registered pharmacist or during the temporary absence of such registered pharmacist, in charge of a registered assistant pharmacist."

The Supreme Court of Minnesota seems not to have doubted that the "charge" intended by the statute is over the "business" as well as the "place", or that the act was constitutional. State v. Zotalis, 214 N. W. 705; State v. Levine, 217 N. W. 342.

We are referred to the case of Louis K. Liggett Company v. Baldridge, Attorney General, decided by the Supreme Court on November 19th last. There a Statute of Pennsylvania provided that every pharmacy shall be owned by a licensed pharmacist and that no corporate drug store not already licensed to do business in the State shall own a [fol. 105] drug store there unless all its members are registered pharmacists. A majority of the court held that "mere ownership of a drug store by one not a pharmacist bears no reasonable relation to the public health," and declared the Act unconstitutional. But Justice Sutherland, who wrote the prevailing opinion, referred with evident approval to the Statute of Pennsylvania which prescribes that "no one but a registered pharmacist may lawfully have charge

of a drug store." Such a requirement doubtless might exist though no prescriptions furnished by physicians were compounded and though the only work of the pharmacist was to sell drugs or patent medicines to customers.

The situation in the present case substantially differs from that referred to in the Liggett decision because the personal charge of the business prescribed by the New York Statute extends beyond mere ownership. It brings some person of adequate scientific training in immediate contact with the customer, renders his advice and service naturally available and has a plain tendency to obviate the defects of the present undirected and haphazard system.

A similar statute to the one under consideration has been adopted in Massachusetts.

The New York legislature was not obliged if it legislated at all to require an examination of the customer by a licensed optometrist before permitting a sale of eyeglasses to him. Doubtless that could have been done. But it might adopt a half way measure safeguarding him by in effect placing sales in charge of a man of scientific training and [fol. 106] rendering the services of the latter naturally available. This it did and this was we think unconstitutional.

The motions for preliminary injunctions are denied.

Inasmuch as the District Attorney of New York County and the Board of Optometry are nowhere in the statute charged with the enforcement of the act each bill is dismissed as to them for this reason as well as for other reasons hereafter stated.

While the complaints allege in substance that the eye glasses sold by the complainants are only magnifying spectacles adapted to the needs of the majority of persons who have defective sight and harmless, yet the fact that the complainants only sold more magnifying eyeglasses does not show that others whose sales would be affected by the requirements of the act have limited or will limit, their sales to magnifying spectacles and that the business in general does not require the regulation provided. Moreover, the complaints do not allege that a supervision of sales of spectacles by optomists who can more accurately fit a customer than he can fit himself and who will be in position to inform him as to eye troubles which cannot be remedied by magnifying glasses is not a step in the public interest.

At the time of the argument of the motion for an injunction, we understand it to be admitted that the sale of eyeglasses, in so far as it might require examination and fitting of the eyes of purchasers of spectacles, was a valid exercise of the police power. The objection was to the regulation attempted on the ground that it did not require the optometrist placed in charge of the place where the spectacles were sold to examine or prescribe and that it, there- [fol. 107] fore, afforded no protection to the public. But for the reasons we have given, we are satisfied that such is not the fair interpretation of the effect of the act and that it in fact tends to promote the public welfare.

Nothing is alleged in either complaint which shows an arbitrary or unconstitutional exercise of legislative power or leaves any question to be determined at final hearing. Each bill is therefore dismissed against the Attorney General as well as the other defendants, on the ground that it states no cause of action.

Augustus N. Hand, Jno. C. Knox, Frank J. Coleman.

[fol. 108] In United States District Court

No. E46-211

[Title omitted]

Order of Substitution—Jan. 4, 1929

On reading and filing the annexed consent, dated the 4 day of January, 1929, it is

Ordered that Hamilton Ward, Attorney General of the State of New York, be and he hereby is substituted as defendant herein, in the place and stead of Albert Ottinger, Attorney General of the State of New York; and it is further

Ordered that the above entitled action be continued and maintained against Hamilton Ward, Attorney General of the State of New York, without prejudice to the proceedings already had herein.

Enter.

Frank J. Coleman, U. S. D. J.

[fol. 109] In United States District Court

No. E46-211

[Title omitted]

Stipulation re Substitution

Whereas, Hamilton Ward was duly elected to the office of the Attorney General of the State of New York on the 6th day of November, 1928, in the place and stead of Albert Ottinger, whose term of office as Attorney General of the State of New York expired on the 31st day of December, 1928; and

Whereas, the said Hamilton Ward duly qualified on the 1st day of January 1929, as the Attorney General of the State of New York, and has entered upon the duties of said office and still holds the same; and

Whereas, there is a substantial need for continuing and maintaining the above entitled action and obtaining an adjudication of the questions involved herein,

It is hereby stipulated and agreed that Hamilton Ward, Attorney General of the State of New York, be substituted as defendant herein, in the place and stead of Albert Ottinger, Attorney General of the State of New York; and

[fol. 110] It is further stipulated and agreed that the above entitled action be continued and maintained against Hamilton Ward, Attorney General of the State of New York, without prejudice to the proceedings already had herein.

Dated New York, January 4, 1929.

Seligsberg & Lewis, Attorneys for Plaintiff. Hamilton Ward, Attorney General of the State of New York.

[fol. 111] IN UNITED STATES DISTRICT COURT

No. E46-211

WILLIAM ROSCHEN, Plaintiff,

against

HAMILTON WARD, Attorney General of the State of New York; Joab H. Banton, District Attorney of New York County, New York, and Williston W. Bissell, Harlow M. Fuller, Thomas McBurnie, William L. Cook, and Frederic A. Woll, Constituting the Board of Optometry Examiners of the State of New York, Defendants

DECREE

This cause come on to be heard upon a notice of motion by the plaintiff for a preliminary injunction, which notice was duly filed in the office of the Clerk of this Court, and presented to Hon. Frank J. Coleman, United States District Judge, who thereupon on the 9th day of October, 1928, ordered that the said application be heard on the 18th day of October, 1928, and the said motion and application for preliminary injunction having on the 18th day of October, 1928, been heard in this Court before a Court consisting of Hon. Augustus N. Hand, United States Circuit Judge, Hon. John C. Knox, United States District Judge, and Hon. Frank J. Coleman, United States District Judge, and at the same time the respective defendants having duly moved in open court for the dismissal of the complaint as against each of them, and due deliberation having been had.

[fol. 112] Now, upon motion of Hamilton Ward, Attorney General, defendant in person, and Joab H. Banton, District Attorney of New York County, defendant in person, and Hamilton Ward, as attorney for the other defendants, it is hereby

Ordered, adjudged, and decreed that the plaintiff's complaint be and the same hereby is dismissed; further

Ordered that the plaintiff's motion for a preliminary injunction be and the same hereby is denied.

Dated New York, January 4, 1929.

Enter.

Augustus N. Hand, United States Circuit Judge. Jno. C. Knox, United States District Judge. Frank J. Coleman, United States District Judge.

113 IN UNITED STATES DISTRICT COURT

No. E46-211

[Title omitted]

PETITION FOR APPEAL AND ORDER ALLOWING SAME

The above named plaintiff, William Roschen, conceiving himself aggrieved by the decree entered herein on the 4 day of January, 1929, in the above entitled action doth hereby appeal from said decree to the Supreme Court of the United States, and he prays that his appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Plaintiff further prays that the defendants, and each of them, their assistants, agents and servants be restrained pending the determination of this appeal from enforcing or attempting to enforce the provisions of Chapter 379 of the Laws of 1928 of the State of New York.

Dated New York, January 4, 1929.

Seligsberg & Lewis, Attorneys for Plaintiff-appellant William Roschen, 43 Cedar Street, Borough of Manhattan, City of New York.

[fol.114] And now, to wit, on the 4 day of January, 1929, it is ordered that the appeal be allowed as prayed for; and it is

Further ordered that the defendants, and each of them, their assistants, agents and servants be restrained pending the determination of this appeal from enforcing or attempting to enforce the provisions of Chapter 379 of the Laws of 1928 of the State of New York, subject to motion on notice by defendants to vacate such stay.

Augustus N. Hand, Circuit Judge. Jno. C. Knox, District Judge. Frank J. Coleman, District Judge.

[fol. 115] IN UNITED STATES DISTRICT COURT

No. E46-211

[Title omitted]

ASSIGNMENT OF ERRORS

And now comes William Roschen, plaintiff-appellant, and makes and files this his assignment of errors.

1. The District Court of the United States for the Southern District of New York erred in denying plaintiff's motion for a preliminary injunction and in dismissing plaintiff's bill of complaint on the ground that it stated no cause of action for the reason that Chapter 379 of the Laws of 1928 of the State of New York is unconstitutional, in that it purports to regulate the practice of optometry and purports to define the sale of spectacles without prescription, diagnosis or examination as the practice of optometry, and in that it attempts, by indirection and inference, to prevent the sale of spectacles without examination by a duly licensed physician or a duly authorized optometrist but fails [fols. 116-123] so to do in that it merely requires the presence of such a person at a counter where such spectacles are sold without requiring that the purchaser avail himself or be compelled to avail himself of the services of such physician or optometrist, and for the further reason that the said Chapter 379 of the Laws of 1928 of the State of New York is unconstitutional insofar as it requires or would require the plaintiff to have in charge of his spectacle counter a duly licensed physician or a duly authorized optometrist, in that said law deprives the plaintiff of his liberty and property without due process of law and denies to the plaintiff equal protection of the law, and grants to optometrists and physicians permission to sell spectacles, eye-glasses and lenses for the correction of vision without examination and prescription, but denies such privilege to the plaintiff and his employees.

2. The District Court of the United States for the Southern District of New York erred in dismissing plaintiff's bill of complaint against the defendant Joab H. Banton, District Attorney of New York County, and the defend-

ants Williston W. Bissell, Harlow M. Fuller, Thomas McBurnie, William L. Cook and Frederic A. Woll, constituting The Board of Optometry Examiners of the State of New York for the further reason that said defendants are charged with the enforcement of Chapter 379 of the Laws of 1928 of the State of New York.

Seligsberg & Lewis, Attorneys for Plaintiff-Appellant, 43 Cedar Street, Borough of Manhattan, City of New York.

[fols. 1-3] In United States District Court, Southern District of New York

S. S. Kresge Company, Plaintiff,

against

Albert Ottinger, Attorney General of the State of New York; Joab H. Banton, District Attorney of New York County, New York, and Williston W. Bissell, Harlow M. Fuller, Thomas McBurnie, William L. Cook, and Frederic A. Woll, Constituting the Board of Optometry Examiners of the State of New York, Defendants

Complaint

S. S. Kresge Company, as plaintiff, brings this its bill of complaint against the defendants above named, and each of them, and complains as follows:

1. Plaintiff is a corporation organized under the laws of the State of Michigan, and a citizen of the State of Michigan, and has been duly authorized to transact business in the State of New York. Plaintiff's principal office and place of business is in the City of Detroit, Michigan, but plaintiff has branch offices and stores throughout the United States.

2. Defendant Albert Ottinger is the Attorney General of the State of New York and defendant Joab H. Banton is the District Attorney of the County of New York, State of New York, and said defendants in their respective capacities

named are holding office under and by virtue of the laws of New York.

[fol. 4] 3. The defendants Williston W. Bissell, Harlow M. Fuller, Thomas McBurnie, William L. Cook and Frederic A. Woll constitute The Board of Optometry Examiners of the State of New York.

4. Each of the defendants is a resident and citizen of the State of New York.

5. The grounds upon which the jurisdiction of the court depends are

(a) that the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000 and arises under the Constitution of the United States; and

(b) that the matter in controversy is between citizens of different states, that is to say, the plaintiff is a citizen of the State of Michigan, and the defendants are citizens of the State of New York.

6. Plaintiff has for fifteen years been engaged in business in the State of New York, operating stores at which various classes of merchandise, including spectacles, are and have been sold. The number of plaintiff's stores has increased from year to year, and plaintiff now owns and operates fifty stores in the State of New York, at each of which spectacles, among other things, are sold.

7. Plaintiff's said stores are operated in its behalf by its employees, and none of such employees has ever examined the eyes of a customer, prescribed treatment for any customer, nor diagnosed any customer's difficulties. Plaintiff's employees offer customers a selection of spectacles [fol. 5] and customers are handed a printed card which is on the counter and which contains printed matter in various sizes of type. Customers purchasing spectacles at plaintiff's stores, select the spectacles which they consider help their vision the most, without assistance, aid or suggestion from plaintiff's employees.

8. Plaintiff sells in each year in the State of New York substantial quantities of spectacles in excess of $20,000, and makes a substantial profit annually directly from such sales

in excess of $5,000, and the fact that plaintiff has spectacles for sale brings customers into plaintiff's stores who purchase other articles in addition to spectacles, and thus plaintiff realizes indirectly a further profit from its spectacle business. The matter in controversy in this suit is the plaintiff's spectacle business and the value thereof exceeds $3,000, exclusive of interest and costs.

9. All of the spectacles sold by plaintiff contain so-called convex spherical lenses, that is, lenses that are merely convex and whose sole aid to vision is that they magnify what the eye sees. Plaintiff has never sold any spectacles containing other than convex spherical lenses.

10. Plaintiff is advised and believes and alleges that the use of convex spherical lenses in spectacles will not injure the sight. All that convex spherical lenses in spectacles do is to magnify the object at which they are directed, and it is to that extent that they facilitate vision.

11. The Legislature of the State of New York has enacted, and the Governor of the State of New York has ap- [fol. 6] proved an Act known as Chapter 379 of the Laws of 1928 in the following words:

Laws of New York.—By Authority

Chapter 379

An Act to Amend the Education Law in Relation to the Sale of Spectacles, Eyeglasses, and Lenses, as Merchandise, at Retail

Became a law March 16, 1928, with the approval of the Governor. Passed, three-fifths being present

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Article fifty-four of chapter twenty-one of the laws of nineteen hundred and nine, entitled "An act relating to education, constituting chapter sixteen of the consolidated laws," as amended by chapter one hundred and forty of the laws of nineteen hundred and ten, such article having been added by chapter eighty-five of the laws of

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nineteen hundred and twenty-seven, is hereby amended by inserting therein a new section, to be section fourteen hundred and thirty-two-a, to read as follows:

§ 1432-a. Sales of Eyeglasses, Spectacles and Lenses at Retail.—It shall be unlawful for any person, firm or corporation to sell, at retail, as merchandise, in any store or established place of business in the state, any spectacles, eyeglasses, or lenses for the correction of vision, unless a duly licensed physician or duly qualified optometrist, certified under this article, be in charge of and *personal attendance at the booth, counter or place, where such articles are sold in such store or established place of business. The peddling of spectacles, eyeglasses or lenses from house to house or on the streets or highways, by a person other than such an optometrist or physician, also shall be unlawful, notwithstanding any law providing for licensing peddlers.

§ 2. Section fourteen hundred and thirty-four of such chapter, as added by chapter eighty-five of the laws of nineteen hundred and twenty-seven, is hereby amended to read as follows:

§ 1434. Construction of Article.—Nothing in this article shall be construed to apply to duly licensed physicians authorized to practice medicine under the laws of the state of New York nor to the sale of toy glasses, goggles consisting of plano white or plano colored lenses or ordinary colored glasses, nor to persons who sell spectacles, eyeglasses or lenses only on prescription from such physicians or from such duly qualified optometrists or who duplicate broken lenses.

§ 3. This act shall take effect September first, nineteen hundred and twenty-eight.

[fol. 7] 12. Section 1433 of the Education Law of the State of New York provides that any violation of the fore-

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*So in original [evidently word "in" omitted.]

STATE OF NEW YORK,
Department of State, ss:

I have compared the preceding with the original law on file in this office, and do hereby certify that the same is a correct transcript therefrom and of the whole of said original law.

Robert Moses, Secretary of State.

going section shall constitute a misdemeanor and shall be punished accordingly.

13. Under Section 193 of the Penal Law of the State of New York, misdemeanors, where no other punishment is specifically prescribed, are punishable by imprisonment for not more than one year, or by a fine of not more than $500, or both.

14. Plaintiff alleges that it would not be possible for it to continue the sale and trading in spectacles at its stores if plaintiff were required to employ a duly qualified optometrist or a physician to be in charge of the counter at which plaintiff sells spectacles. The cost of hiring such a person in each of plaintiff's stores would far exceed not only plaintiff's profit from the sale of spectacles in each year, but would exceed plaintiff's entire income for the year from the sale of spectacles, and if plaintiff be required to place a duly licensed physician or a duly qualified optometrist in charge of each counter in each of its stores at which spectacles are sold, plaintiff would be compelled to cease and abandon the sale of spectacles in its stores.

15. Persons with minor defects in vision constitute about 75% of the persons wearing spectacles, and they are able to assist themselves by the selection of convex spherical glasses which magnify the objects to be seen. The judgment of the purchaser of glasses or of the person whose vision is defective is the only thing relied upon by the plain-
[fol. 8] tiff and his customers in the sale of glasses. A licensed physician treating the eye relies in large part upon the judgment of his patient in response to questions, but also may examine the patient to determine the existence of physical defects in the eye. But a person who believes his eyesight to be defective, whether he purchases spectacles from the plaintiff or from others similarly situated, or whether he purchases spectacles from or through an optometrist or physician, in all cases must depend to a large extent upon his own judgment. The sale of spectacles, therefore, with convex spherical lenses is like the sale of any other merchandise from the plaintiff's stores,—an attempt by the seller to furnish the buyer with an article that suits him.

16. Plaintiff alleges that the said Act of the Legislature of New York insofar as it requires or would require the plaintiff to have in charge of each of its spectacle counters a duly licensed physician or a duly qualified optometrist is unconstitutional, in that it deprives the plaintiff of its liberty and property without due process of law, and denies to the plaintiff equal protection of the law.

17. Plaintiff further alleges that the said Act is unconstitutional, in that it purports to regulate the practice of optometry and purports to define the sale of spectacles without prescription, diagnosis or examination as the practice of optometry, and in that it attempts, by indirection and inference, to prevent the sale of spectacles without examination by a duly licensed physician or a duly qualified optometrist, but fails so to do in that it merely requires the presence of such a person at a counter where [fol. 9] such spectacles are sold without requiring that the purchaser avail himself or be compelled to avail himself of the services of such physician or optometrist.

18. Plaintiff further alleges that it is the public and official duty of the defendants in this suit to enforce the said law if it be constitutional, and that they threaten to enforce the same against this plaintiff and against others similarly situated.

19. Plaintiff alleges that this suit is authorized by law to be brought by it under Section 266 of the Judicial Code of the United States.

20. Plaintiff further alleges that if the defendants be permitted to enforce said Chapter 379 of the Laws of New York of 1928 as against this plaintiff, the plaintiff's business in spectacles will be completely destroyed for the reasons in this complaint set forth, and plaintiff will be deprived of the profit and advantage which come to it from the sale of spectacles, not only the direct profit derived therefrom but the indirect profit resulting from plaintiff's being able to deal in a variety of merchandise and to attract the trade of the customers of each class of merchandise to other articles which the plaintiff has for sale. Such damages as plaintiff will suffer cannot be accurately computed in a court of law, and plaintiff further alleges

that it has no adequate remedy at law and can only have redress in a court of equity.

21. Plaintiff further alleges that the defendants, and each of them, unless restrained from so doing by an order of this court, will institute proceedings in the courts of the [fol. 10] State of New York to enforce the said law and to prosecute anyone who shall violate its terms.

Wherefore plaintiff demands that the defendants, and each of them, their assistants, agents and servants, be restrained, during the pendency of this suit and perpetually, from enforcing or attempting to enforce the provisions of Chapter 379 of the Laws of New York of 1928 against this plaintiff, and plaintiff prays for such other and further relief as to the court may seem just and proper, together with the plaintiff's costs and disbursements of this suit.

Seligsberg & Lewis, Attorneys for Plaintiff. Office & Post Office address: 43 Cedar Street, Borough of Manhattan, New York City. I. Maurice Wormser, W. N. Seligsberg, of Counsel.

[fol. 11] *Duly sworn to by Howard G. Patten. Jurat omitted in printing.*

[fol. 12] In United States District Court

No. E46-402

[Title omitted]

Notice of Motion for Temporary Injunction

Sirs: Please take notice that upon the verified bill of complaint herein, and the affidavits of Martin L. Miller, verified August 21, 1928, and of Walter De Young, verified August 23, 1928, filed with the Clerk of this court in the suit of William Roschen, plaintiff, against the above named defendants, as defendants, (Equity No. 46,211), we shall move this court at a time to be fixed by the court, for a temporary injunction restraining the defendants and each of them during the pendency of this suit, their assistants,

agents and servants, from enforcing or attempting to enforce the provisions of Chapter 379 of the Laws of New York of 1928 against the plaintiff, and particularly from proceeding against the plaintiff in any manner whatsoever, and from permitting to be brought, directly or indirectly, any action or proceeding at law or in equity for the purpose of enforcing said Chapter 379 of the Laws of New York of 1928 against this plaintiff, and for such other [fols. 13-36] and further relief as to the court may seem proper.

Dated New York, October —, 1928.

Yours, etc., Seligsberg & Lewis, Attorneys for Plaintiff. Office & Post Office address: 43 Cedar Street, Borough of Manhattan, New York City.

To the above-named defendants and each of them.

[fol. 37] In United States District Court

No. E46-402

[Title omitted]

Order Setting Cause

The court having considered the verified bill of complaint, duly filed in the above entitled action, and the motion of the plaintiff for a temporary injunction herein, and it appearing to the court that the suit is one requiring the presence on the hearing of the application for a temporary injunction of three judges, one of whom shall be a Circuit Judge of the United States or a Justice of the Supreme Court.

It is by the court ordered that the application for such temporary injunction be held on the 18th day of October 1928, at 2.30 o'clock in the afternoon, in Room of Circuit Court of Appeals of the United States Court House, in the Post Office Building, Park Row, Borough of Manhattan, New York City.

Dated October 9, 1928.

Frank J. Coleman, United States District Judge.

[fol. 38] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION TO DISMISS

SIRS: Please take notice that the annexed motion to dismiss the bill of complaint herein, this date filed in the District Court of the United States for the Southern District of New York in the office of the Clerk of said court and that the said motion will be set down for hearing and brought on for argument at a term of the said court, constituted pursuant to § 266 of the Judicial Code, to be held at the Old Post Office in the City and County of New York, Southern District of New York on the 23rd day of October, 1928, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated New York, October 11th, 1928.

Yours, etc., Joab H. Banton, District Attorney in and for the County of New York. Edward V. Loughlin, Solicitor for Joab H. Banton.

To Messrs. Seligsberg and Lewis, Solicitors for Complain-t, 43 Cedar Street, New York, N. Y.

[fol. 39] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS BILL OF COMPLAINT

Now comes the defendant, Joab H. Banton, as District Attorney of the County of New York, and upon the bill of complaint herein, moves that the said bill of complaint be dismissed for the following reasons and upon the following grounds, to wit:

1. That it appears upon the face of the bill of complaint that the facts stated therein are insufficient to constitute a cause of action in equity.

2. That it appears upon the face of the bill of complaint that the complainant has a pla-n, adequate and complete remedy at law.

3. That it does not appear upon the face of the bill of complaint that no sufficient facts are averred therein to show that intervention of a court of equity and the assumption of jurisdiction by such a court is necessary or essential in order to effectually protect the property or rights of the complain-t from great and irreparable injury or from any injury whatsoever.

[fol. 40] 4. That it appears on the face of the bill of complaint that the complainant is not within the class of persons who are or may be injured by the alleged unconstitutionality of the provisions of the statutes set forth in the bill of complaint.

5. That chapter 379 of the Laws of 1928, is a valid statute duly passed by the Legislature of the State of New York in the due exercise of its lawful and constitutional powers and does not violate any of the provisions of either Article 1, § 8, of the Constitution of the United States, or the 14th Amendment to such Constitution; and it does not appear upon the face of the bill of complaint that the facts averred therein that the said statute, or the enforcement thereof by the State of New York by and through its governmental and administrative agencies, operates or will operate to interfere unwarrantably with the complainant's business or to deprive or deny the complainant of the equal protection of the laws or to deprive him of liberty or of any property or rights of property without due process of law.

6. That Chapter 379 of the New York Laws of 1928 is a valid statute, duly passed by the Legislature of the State of New York, in the due exercise of its lawful and constitutional powers and does not violate any of the provisions of either Article 1, § 8, of the Constitution of the United States or the 14th Amendment to such Constitution; and it does not appear upon the face of the bill of complaint or from the facts averred therein, that the said statute, or the enforcement thereof by the State of New York by and through the governmental and administrative agencies, operates or will operate to interfere

unwarrantably with complainant's business or to deprive [fols. 41-96] or deny the complainant of the equal protection of the laws, or to deprive him of liberty or of any property or rights of property without due process of law.

7. That it appears upon the face of the bill of complaint that to grant the relief sought by the complainant would constitute an unlawful and unconstitutional interference by the agencies of the Government of the United States with the lawful and constitutional power, right and duty of the State of New York and its governmental agencies (including the District Attorney of the County of New York) to prosecute violations of criminal statutes of the State of New York.

8. That it appears upon the face of the bill of complaint that this court is without power or authority to grant the relief or to render the judgment and decree prayed for.

9. That no sufficient facts are alleged in the bill of complaint to warrant or justify the granting of the relief prayed for or any other equitable relief.

Wherefore, for the reasons and upon the grounds aforesaid, the defendant, Joab H. Banton, as District Attorney of the County of New York, respectfully moves this Court that the bill of complaint herein be dismissed as to him.

Dated New York, N. Y., —— —, 1928.

Joab H. Banton, District Attorney of the County of New York. Edward V. Loughlin, Solicitor for Defendant Joab H. Banton, as District Attorney of the County of New York, 137 Centre Street, New York, N. Y.

[fols. 97-106] Opinion omitted; printed side page 98 ante.

[fol. 107] IN UNITED STATES DISTRICT COURT

No. E46-402

[Title omitted]

ORDER OF SUBSTITUTION—Jan. 4, 1929

On reading and filing the annexed consent, dated the 4 day of January, 1929, it is

Ordered that Hamilton Ward, Attorney General of the State of New York, be and he hereby is substituted as defendant herein, in the place and stead of Albert Ottinger, Attorney General of the State of New York; and it is further

Ordered that the above entitled action be continued and maintained against Hamilton Ward, Attorney General of the State of New York, without prejudice to the proceedings already had herein.

Enter.

Frank J. Coleman, U. S. D. C.

[fol. 108] IN UNITED STATES DISTRICT COURT

No. E46-402

[Title omitted]

STIPULATION RE SUBSTITUTION

Whereas, Hamilton Ward was duly elected to the office of the Attorney General of the State of New York on the 6th day of November, 1928, in the place and stead of Albert Ottinger, whose term of office as Attorney General of the State of New York expired on the 31st day of December, 1928; and

Whereas, the said Hamilton Ward duly qualified on the 1st day of January, 1929, as the Attorney General of the State of New York, and has entered upon the duties of said office and still holds the same; and

Whereas, there is a substantial need for continuing and maintaining the above entitled action and obtaining an adjudication of the questions involved herein,

It is hereby stipulated and agreed that Hamilton Ward, Attorney General of the State of New York, be substituted as defendant herein, in the place and stead of Albert Ottinger, Attorney General of the State of New York; [fol. 109] and

It is further stipulated and agreed that the above entitled action be continued and maintained against Hamilton Ward, Attorney General of the State of New York, without prejudice to the proceedings already had herein.

Dated New York, January 4, 1929.

Seligsberg & Lewis, Attorneys for Plaintiff. Hamilton Ward, Attorney General of the State of New York.

[fol. 110] In United States District Court

No. E46-402

S. S. Kresge Company, Plaintiff,

against

Hamilton Ward, Attorney General of the State of New York; Joab H. Banton, District Attorney of New York County, New York, and Williston W. Bissell, Harlow M. Fuller, Thomas McBurnie, William L. Cook, and Frederic A. Woll, Constituting the Board of Optometry Examiners of the State of New York, Defendants

Decree

This cause came on to be heard upon a notice of motion by the plaintiff for a preliminary injunction, which notice was duly filed in the office of the Clerk of this Court, and presented to Hon. Frank J. Coleman, United States District Judge, who thereupon on the 9th day of October, 1928, ordered that the said application be heard on the 18th day of October, 1928, and the said motion and application for preliminary injunction having on the 18th day of October, 1928, been heard in this Court before a Court consisting of

Hon. Augustus N. Hand, United States Circuit Judge, Hon. John C. Knox, United States District Judge, and Hon. Frank J. Coleman, United States District Judge, and at the same time the respective defendants having duly moved in open court for the dismissal of the complaint as against each of them, and due deliberation having been had,

[fol. 111] Now, upon motion of Hamilton Ward, Attorney General, defendant in person, and Joab H. Banton, District Attorney of New York County, defendant in person, and Hamilton Ward, as attorney for the other defendants, it is hereby

Ordered, adjudged, and decreed that the plaintiff's complaint be and the same hereby is dismissed; further

Ordered that the plaintiff's motion for a preliminary injunction be and the same hereby is denied.

Dated New York, January 4, 1929.

Enter.

Augustus N. Hand, United States Circuit Judge.
Jno. C. Knox, United States District Judge.
Frank J. Coleman, United States District Judge.

[fol. 112] In United States District Court

No. E46-402

[Title omitted]

Petition for Appeal and Order Allowing Same

The above named plaintiff, S. S. Kresge Company, conceiving itself aggrieved by the decree entered herein on the 4 day of January, 1929, in the above entitled action doth hereby appeal from said decree to the Supreme Court of the United States, and it prays that its appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Plaintiff further prays that the defendants, and each of them, their assistants, agents and servants be restrained pending the determination of this appeal from enforcing

or attempting to enforce the provisions of Chapter 379 of the Laws of 1928 of the State of New York.

Dated New York, January 4, 1929.

Seligsberg & Lewis, Attorneys for Plaintiff-appellant S. S. Kresge Company, 43 Cedar Street, Borough of Manhattan, City of New York.

[fol. 113] And now, to wit, on the 4 day of January, 1929, it is ordered that the appeal be allowed as prayed for; and it is

Further ordered that the defendants, and each of them, their assistants, agents and servants, be restrained pending the determination of this appeal from enforcing or attempting to enforce the provisions of Chapter 379 of the Laws of 1928 of the State of New York, subject to motion on notice by defendants to vacate such stay.

Augustus N. Hand, Circuit Judge. Jno. C. Knox, District Judge. Frank J. Coleman, District Judge.

[fol. 114] In United States District Court

No. E46-402

[Title omitted]

Assignment of Errors

And now comes S. S. Kresge Company, plaintiff-appellant, and makes and files this its assignment of errors.

1. The District Court of the United States for the Southern District of New York erred in denying plaintiff's motion for a preliminary injunction and in dismissing plaintiff's bill of complaint on the ground that it stated no cause of action for the reason that Chapter 379 of the Laws of 1928 of the State of New York is unconstitutional, in that it purports to regulate the practice of optometry and purports to define the sale of spectacles without prescription, diagnosis or examination as the practice of optometry, and in that it attempts, by indirection and inference, to prevent

the sale of spectacles without examination by a duly licensed physician or a duly authorized optometrist but fails so to do in that it merely requires the presence of such [fols. 115-121] a person at a counter where such spectacles are sold without requiring that the purchaser avail himself or be compelled to avail himself of the services of such physician or optometrist, and for the further reason that the said Chapter 379 of the Laws of 1928 of the State of New York is unconstitutional insofar as it requires or would require the plaintiff to have in charge of its spectacle counter a duly licensed physician or a duly authorized optometrist, in that said law deprives the plaintiff of its liberty and property without due process of law and denies to the plaintiff equal protection of the law, and grants to optometrists and physicians permission to sell spectacles, eye-glasses and lenses for the correction of vision without examination and prescription, but denies such privilege to the plaintiff and its employees.

2. The District Court of the United States for the Southern District of New York erred in dismissing plaintiff's bill of complaint against the defendant Joab H. Banton, District Attorney of New York County, and the defendants Williston W. Bissell, Harlow M. Fuller, Thomas McBurnie, William L. Cook and Frederic A. Woll, constituting The Board of Optometry Examiners of the State of New York for the further reason that said defendants are charged with the enforcement of Chapter 379 of the Laws of 1928 of the State of New York.

Seligsberg & Lewis, Attorneys for Plaintiff-Appellant, 43 Cedar Street, Borough of Manhattan, City of New York.

[fol. 122] In Supreme Court of the United States

Statement of Points to be Relied upon and Stipulation as to Printing Record—Filed Jan. 31, 1929

The appellant presents and files the following as a definite statement of the points on which he intends to rely.

1. The District Court of the United States for the Southern District of New York erred in denying plaintiff's mo-

tion for a preliminary injunction and in dismissing plaintiff's bill of complaint on the ground that it stated no cause of action, for the reasons

(a) That Chapter 379 of the Laws of 1928 of the State of New York is unconstitutional in that it purports to regulate the practice of optometry and purports to define the sale of spectacles without prescription, diagnosis or examination as the practice of optometry; and

(b) That Chapter 379 of the Laws of 1928 of the State of New York is unconstitutional in that it attempts, by indirection and inference, to prevent the sale of spectacles without examination by a duly licensed physician or a [fol. 123] duly authorized optometrist, but fails so to do in that said Chapter merely requires the presence of such a person at the counter where such spectacles are sold without requiring that the purchaser avail himself or be compelled to avail himself of the services of such physician or optometrist; and

(c) That Chapter 379 of the Laws of 1928 of the State of New York is unconstitutional insofar as it requires the plaintiff to have in charge of his spectacle counter a duly licensed physician or a duly authorized optometrist, because said Chapter deprives the plaintiff of his liberty and property without due process of law, and denies to the plaintiff the equal protection of the law and grants to optometrists and physicians permission to sell spectacles, eyeglasses and lenses for the correction of vision as merchandise and without examination or prescription, but denies such privilege to the plaintiff and his employees; and

(d) That Chapter 379 of the Laws of 1928 of the State of New York is unconstitutional insofar as it permits the sale of spectacles, eye-glasses and lenses for the correction of vision without examination or prescription and merely as merchandise, although said law purports to forbid the same, but requires the presence of a duly authorized optometrist or a duly licensed physician in plaintiff's store at the time of such sale by plaintiff but makes no such requirement if the sale be made by or on behalf of a duly authorized optometrist or by or on behalf of a duly licensed physician, and by so doing deprives the plaintiff of the right to sell spectacles, eye-glasses and lenses for the correction of vision in the same manner as such sale is per-

[fol. 124] mitted to duly authorized optometrists or duly licensed physicians.

2. The District Court of the United States for the Southern District of New York erred in dismissing plaintiff's bill of complaint against the defendant Joab H. Banton, District Attorney of New York County, and the defendants Williston W. Bissell, Harlow M. Fuller, Thomas McBurnie, William L. Cook and Frederic A. Woll, constituting The Board of Optometry Examiners of the State of New York for the further reason that said defendants are charged with the enforcement of Chapter 379 of the Laws of 1928 of the State of New York.

The appellant files herewith a stipulation and consent of all the parties to this appeal designating the parts of the record which appellant thinks necessary for the consideration of the appeal herein, to which is appended a consent by all the parties that the appeal be heard on the parts so designated, and the appellant also files herewith a stipulation of all of the parties that the record for this appeal be printed as a joint record with the record in the appeal of S. S. Kresge Company against the same defendants-appellees.

Seligsberg & Lewis, Attorneys for Plaintiff Appellant, 43 Cedar Street, Borough of Manhattan, City of New York.

[fol. 124½] Copy received. Joab H. Banton, D. A., N. Y. Co. Edward V. Laughlin, Solicitor for Deft., Dist. Atty., N. Y. Co. F.W.B. Jan. 30 29.

Copy of within paper received Jan. 30, 1929. Hamilton Ward, Attorney General.

[fol. 125] Sirs: Please take notice that the following is a definite statement of the parts of the record herein which appellant thinks necessary for the consideration of the appeal herein:

1. Amended bill of complaint, and all exhibits annexed thereto.

2. Notice of motion for preliminary injunction.

3. Affidavit of Martin L. Miller, sworn to 31st day of August, 1928, and all exhibits annexed thereto.

4. Affidavit of Walter DeYoung, sworn to 23rd day of August, 1928, and all exhibits annexed thereto.

5. Supplementary notice of motion for preliminary injunction.

6. Order for hearing of application for preliminary injunction.

7. Notice of motion to dismiss complaint by defendant, Joab H. Banton, District Attorney of New York County. [fol. 126] 8. Affidavit of James Sullivan, sworn to 17th day of October, 1928.

9. Affidavit of Frank D. Morehouse, sworn to 23rd day of October, 1928.

10. Affidavit of Guy A. Henry, sworn to 11th day of October, 1928.

11. Affidavit of Ernest H. Kiekenapp, sworn to 8th day of October, 1928.

12. Affidavit of E. Leroy Ryer, sworn to 18th day of October, 1928.

13. Affidavit of Henry S. Manley, sworn to 17th day of October, 1928.

14. Affidavit of Edmund F. Cooke, sworn to 18th day of October, 1928.

15. Opinion of Augustus N. Hand, Circuit Judge, for the Court.

16. Consent and order substituting Hamilton Ward, Attorney General of the State of New York, as a defendant in place of Albert Ottinger, Attorney General of the State of New York.

17. Decree.

18. Petition for appeal.

19. Order allowing appeal and granting stay.

20. Assignment of errors.

The printed record should also show that the original record on file contains:

1. Praecipe for subpœna.

2. A Subpœna in due form addressed to the defendants herein, with affidavits of service annexed.

[fol. 127] 3. Citation with proof of service.

4. Stipulation agreeing to record.
5. Clerk's Certificate.

Dated, the 31 day of January, 1929.

Yours, etc., Seligsberg & Lewis, Solicitors for Appellant, 43 Cedar Street, Borough of Manhattan, City of New York.

We consent to a hearing of the appeal in this action on the parts of the record designated above by the appellant.

Dated the 31 day of January, 1929.

Hamilton Ward, Attorney for Appellee Hamilton Ward. Hamilton Ward, Attorney for Appellees Williston W. Bissell et al., etc. Joab H. Banton, Appellee Joab H. Banton. Edward V. Loughlin, Attorney for Defendant Joab H. Banton.

[File endorsement omitted.]

[fol. 128] In Supreme Court of the United States

No. 668

Statement of Points to be Relied upon and Stipulation as to Printing Record—Filed Jan. 31, 1929

The appellant presents and files the following as a definite statement of the points on which it intends to rely.

1. The District Court of the United States for the Southern District of New York erred in denying plaintiff's motion for a preliminary injunction and in dismissing plaintiff's bill of complaint on the ground that it stated no cause of action, for the reasons

(a) That Chapter 379 of the Laws of 1928 of the State of New York is unconstitutional in that it purports to regulate the practice of optometry and purports to define the sale of spectacles without prescription, diagnosis or examination as the practice of optometry; and

(b) That Chapter 379 of the Laws of 1928 of the State of New York is unconstitutional in that it attempts, by in-

direction and inference, to prevent the sale of spectacles without examination by a duly licensed physician or a duly [fol. 129] authorized optometrist, but fails so to do in that said Chapter merely requires the presence of such a person at the counter where such spectacles are sold without requiring that the purchaser avail himself or be compelled to avail himself of the services of such physician or optometrist; and

(c) That Chapter 379 of the Laws of 1928 of the State of New York is unconstitutional insofar as it requires the plaintiff to have in charge of its spectacle counter a duly licensed physician or a duly authorized optometrist, because said Chapter deprives the plaintiff of its liberty and property without due process of law, and denies to the plaintiff the equal protection of the law and grants to optometrists and physicians permission to sell spectacles, eyeglasses and lenses for the correction of vision as merchandise and without examination or prescription, but denies such privilege to the plaintiff and its employees; and

(d) That Chapter 379 of the Laws of 1928 of the State of New York is unconstitutional insofar as it permits the sale of spectacles, eye-glasses and lenses for the correction of vision without examination or prescription and merely as merchandise, although said Law purports to forbid the same, but requires the presence of a duly authorized optometrist or a duly licensed physician in plaintiff's store at the time of such sale by plaintiff but makes no such requirement if the sale be made by or on behalf of a duly authorized optometrist or by or on behalf of a duly licensed physician, and by so doing deprives the plaintiff of the right to sell spectacles, eye-glasses and lenses for the correction of vision in the same manner as such sale is permitted to [fol. 130] duly authorized optometrists or duly licensed physicians.

2. The District Court of the United States for the Southern District of New York erred in dismissing plaintiff's bill of complaint against the defendant Joab H. Banton, District Attorney of New York County, and the defendants Williston W. Bissell, Harlow M. Fuller, Thomas McBurnie, William L. Cook and Frederic A. Woll, constituting The Board of Optometry Examiners of the State of New York

for the further reason that said defendants are charged with the enforcement of Chapter 379 of the Laws of 1928 of the State of New York.

The appellant files herewith a stipulation and consent of all the parties to this appeal designating the parts of the record which appellant thinks necessary for the consideration of the appeal herein, to which is appended a consent by all the parties that the appeal be heard on the parts so designated, and the appellant also files herewith a stipulation of all of the parties that the record for this appeal be printed as a joint record with the record in the appeal of William Roschen against the same defendants-appellees.

Seligsberg & Lewis, Attorneys for Plaintiff-Appellant, 43 Cedar Street, Borough of Manhattan, City of New York.

[fol. 130½] Copy received. Joab H. Banton, D. A., N. Y. Co. Edward V. Loughlin, Solicitor for Deft. D. A., N. Y. Co. F. B. Jan. 30/29.

Copy of within paper received Jan. 30, 1929. Hamilton Ward, Attorney General, Atty.

[fol. 131] Sirs: Please take notice that the following is a definite statement of the parts of the record herein which appellant thinks necessary for the consideration of the appeal herein:

1. Bill of complaint and amendments thereto, and all exhibits annexed thereto.

2. Notice of motion for preliminary injunction.

3. Order for hearing of application for preliminary injunction.

4. Notice of motion to dismiss complaint by defendant, Joab H. Banton, District Attorney of New York County.

5. Opinion of Augustus N. Hand, Circuit Judge, for the Court.

6. Consent and order substituting Hamilton Ward, At-
[fol. 132] torney General of the State of New York, as a defendant in place of Albert Ottinger, Attorney General of the State of New York.

7. Decree.

8. Petition for appeal.

9. Order allowing appeal and granting stay.

10. Assignment of errors.

The printed record should also show that the original record on file contains:

1. Praecipe for subpœna.

2. A Subpœna in due form addressed to the defendants herein, with affidavits of service annexed.

3. Affidavit of Martin L. Miller, sworn to 21st day of August, 1928, and all exhibits annexed thereto.

4. Affidavit of Walter De Young, sworn to 23rd day of August, 1928, and all exhibits annexed thereto.

5. Affidavit of James Sullivan, sworn to 17th day of October, 1928.

6. Affidavit of Frank D. Morehouse, sworn to 23rd day of October, 1928.

7. Affidavit of Guy A. Henry, sworn to 11th day of October, 1928.

8. Affidavit of Ernest H. Kiekenapp, sworn to 8th day of October, 1928.

9. Affidavit of E. Leroy Ryer, sworn to 18th day of October, 1928.

10. Affidavit of Henry S. Manley, sworn to 17th day of October, 1928.

11. Affidavit of Edmund F. Cooke, sworn to 18th day of October, 1928.

[fols. 133 & 133a] 12. Citation with proof of service.

13. Stipulation agreeing to record.

14. Clerk's Certificate.

Dated the 31 day of January, 1929.

Yours, etc., Seligsberg & Lewis, Solicitors for Appellant, 43 Cedar Street, Borough of Manhattan, City of New York.

We consent to a hearing of the appeal in this action on the parts of the record designated above by the appellant.

Dated the 31 day of January, 1929.

Hamilton Ward, Attorney for Appellee Hamilton Ward. Hamilton Ward, Attorney for Appellees Williston W. Bissell et al., etc., Joab H. Banton, Appellee Joab H. Banton. Edward V. Loughlin, Attorney for Defendant Joab H. Banton.

[fol. 133b] [File endorsement omitted.]

[fol. 134] In United States Supreme Court

667-668

Stipulation to Print Joint Record—Filed Jan. 31, 1929

Whereas, in each of the above entitled suits an appeal has been taken from the decree therein entered in the District Court of the United States for the Southern District of New York and each has been removed to the Supreme Court of the United States by appeal.

Now, therefore, it is hereby stipulated by and between the parties to the said suits that the records for the said appeals in and to the Supreme Court of the United States [fols. 135 & 136] shall be printed as a joint record.

Dated January 31, 1929.

Seligsberg & Lewis, Attorneys and Solicitors for Plaintiffs S. S. Kresge Company and William Roschen. Hamilton Ward, Attorney and Solicitor for Defendant Hamilton Ward. Hamilton Ward, Attorney and Solicitor for Defendants Williston W. Bissell, Harlow M. Fuler, Thomas McBurnie, William L. Cook, and Frederic A. Woll, Constituting the Board of Optometry Examiners of the State of New York. Joab H. Banton, Attorney and Solicitor for Defendant Joab H. Banton.

[fol. 137] [File endorsement omitted.]

[fol. 138] Endorsed on cover: File No. 33,976. D. C. U. S., Southern New York. Term No. 667. William Roschen, appellant, vs. Hamilton Ward, Attorney General of the State of New York; Joab H. Banton, District Attorney of New York County, New York, and Williston W. Bissell, et al., etc. Filed January 31, 1929. File No. 33,976.

Endorsed on cover: File No. 33,977. D. C. U. S., Southern New York. Term No. 668. S. S. Kresge Company, appellant, vs. Hamilton Ward, Attorney General of the State of New York; Joab H. Banton, District Attorney of New York County, New York, and Williston W. Bissell, et al., etc. Filed January 31, 1929. File No. 33,977.

FILED
FEB 23
CHARLES ELM

IN THE

Supreme Court of the United States

October Term, 1928.

No. 667.

WILLIAM ROSCHEN,

Appellant,

against

HAMILTON WARD, Attorney General of the State of New York, JOAB H. BANTON, District Attorney of New York County, New York, and WILLISTON W. BISSELL, HARLOW M. FULLER, THOMAS McBURNIE, WILLIAM L. COOK and FREDERIC A. WOLL, constituting The Board of Optometry Examiners of the State of New York,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT OF JURISDICTION.

SELIGSBERG & LEWIS,
Attorneys for Appellant,
Office & P. O. Address,
43 Cedar Street,
Borough of Manhattan,
New York City, N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

No. 667

WILLIAM ROSCHEN,

Appellant,

against

HAMILTON WARD, Attorney General of the State of New York, JOAB H. BANTON, District Attorney of New York County, New York, and WILLISTON W. BISSELL, HARLOW M. FULLER, THOMAS McBURNIE, WILLIAM L. COOK and FREDERIC A. WOLL, constituting The Board of Optometry Examiners of the State of New York,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Statement of Jurisdiction.

Appellant submits, in compliance with Rule 12, Revised Rules of the Supreme Court of the United States, adopted June 5, 1928, the following statement of the basis of this Court's jurisdiction to review, on appeal, the judgment of the District Court.

A.

STATUTORY PROVISION SUSTAINING JURISDICTION.

This appeal is prosecuted directly from a decree of the District Court on a motion for preliminary injunction heard and determined by three judges, of whom at least one was a Cir-

cuit Judge, and is prosecuted directly to this Court under Section 266 of the Judicial Code, which provides for an appeal directly to this Court from an order granting or denying, after notice of hearing, an interlocutory injunction restraining the enforcement of a State Statute on the ground of the unconstitutionality of such Statute, and which also provides for a similar direct appeal to this Court from a final decree denying a permanent injunction in such case.

B.

The decree (R., 111)* denying the motion for preliminary injunction and dismissing the plaintiff's complaint (R., 3-11) was entered on the 4th day of January, 1929. The application for the appeal (R., 114) was presented and the appeal allowed on the 4th day of January, 1929 (R., 114).

C.

The nature of the case is a suit for injunction against Hamilton Ward, Attorney General of the State of New York, Joab H. Banton, District Attorney of New York County, New York, and Williston W. Bissell, Harlow M. Fuller, Thomas McBurnie, William L. Cook and Frederic A. Woll, constituting The Board of Optometry Examiners of the State of New York, enjoining them from enforcing or attempting to enforce the provisions of Chapter 379 of the Laws of New York of 1928 against this plaintiff (R., 3-11). The rulings of the Court below were

(a) A denial of the application for interlocutory injunction; and

(b) A dismissal of the bill seeking permanent injunction (R., 111).

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* All references to the record are to the pages of the typewritten record as prepared by the Clerk of the District Court. The record has not yet been printed.

D.

CASES SUSTAINING JURISDICTION.

Interstate Busses Corporation v. *Blodgett*, 276 U. S. 245;

Palmetto Fire Insurance Co. v. *Connecticut*, 272 U. S. 295;

Herkness v. *Irion*, decided at the present term of this Court, viz., on November 19, 1928, but not yet officially reported. This case is reported unofficially in 49 Sup. Ct. Rep. at page 40.

Dated, February 8, 1929.

Respectfully submitted,

SELIGSBERG & LEWIS,
Attorneys for Plaintiff-Appellant,
By W. N. SELIGSBERG,
Of Counsel.

Due and timely service of the foregoing statement of jurisdiction is acknowledged this 13th day of February, 1929.

HAMILTON WARD,
Attorney for defendants, Bissell, Fuller, McBurnie, Cook and Woll.

HAMILTON WARD,
Attorney General,
in Person.

JOAB H. BANTON,
District Attorney,
Defendant in Person.

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FILE
FEB 23
CHARLES ELMO

IN THE

Supreme Court of the United States

October Term, 1928.

No. 668.

S. S. KRESGE COMPANY,

Appellant,

against

HAMILTON WARD, Attorney General of the State of New York, JOAB H. BANTON, District Attorney of New York County, New York, and WILLISTON W. BISSELL, HARLOW M. FULLER, THOMAS McBURNIE, WILLIAM L. COOK and FREDERIC A. WOLL, constituting The Board of Optometry Examiners of the State of New York,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

STATEMENT OF JURISDICTION.

SELIGSBERG & LEWIS,
Attorneys for Appellant,
Office & P. O. Address,
43 Cedar Street,
Borough of Manhattan,
New York City, N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928

No. 668

S. S. KRESGE COMPANY,

Appellant,

against

HAMILTON WARD, Attorney General of the State of New York, JOAB H. BANTON, District Attorney of New York County, New York, and WILLISTON W. BISSELL, HARLOW M. FULLER, THOMAS McBURNIE, WILLIAM L. COOK and FREDERIC A. WOLL, constituting The Board of Optometry Examiners of the State of New York,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Statement of Jurisdiction.

Appellant submits, in compliance with Rule 12, Revised Rules of the Supreme Court of the United States, adopted June 5, 1928, the following statement of the basis of this Court's jurisdiction to review, on appeal, the judgment of the District Court.

A.

STATUTORY PROVISION SUSTAINING JURISDICTION.

This appeal is prosecuted directly from a decree of the District Court on a motion for preliminary injunction heard and determined by three judges, of whom at least one was a

Circuit Judge, and is prosecuted directly to this Court under Section 266 of the Judicial Code, which provides for an appeal directly to this Court from an order granting or denying, after notice of hearing, an interlocutory injunction restraining the enforcement of a State Statute on the ground of the unconstitutionality of such Statute, and which also provides for a similar direct appeal to this Court from a final decree denying a permanent injunction in such case.

B.

The decree (R., 110)* denying the motion for preliminary injunction and dismissing the plaintiff's complaint (R., 3-11) was entered on the 4th day of January, 1929. The application for the appeal (R., 113) was presented and the appeal allowed on the 4th day of January, 1929 (R., 113).

C.

The nature of the case is a suit for injunction against Hamilton Ward, Attorney General of the State of New York, Joab H. Banton, District Attorney of New York County, New York, and Williston W. Bissell, Harlow M. Fuller, Thomas McBurnie, William L. Cook and Frederic A. Woll, constituting The Board of Optometry Examiners of the State of New York, enjoining them from enforcing or attempting to enforce the provisions of Chapter 379 of the Laws of New York of 1928 against this plaintiff (R., 3-11). The rulings of the Court below were

(a) A denial of the application for interlocutory injunction (R., 110).

(b) A dismissal of the bill seeking permanent injunction (R., 110).

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* All references to the record are to the pages of the typewritten record as prepared by the Clerk of the District Court. The record has not yet been printed.

D.

CASES SUSTAINING JURISDICTION.

Interstate Busses Corporation v. *Blodgett*, 276 U. S. 245;

Palmetto Fire Insurance Co. v. *Connecticut*, 272 U. S. 295;

Herkness v. *Irion*, decided at the present term of this Court, viz., on November 19, 1928, but not yet officially reported. This case is reported unofficially in 49 Sup. Ct. Rep. at page 40.

Dated, February 8, 1929.

Respectfully submitted,

SELIGSBERG & LEWIS,
Attorneys for Plaintiff-Appellant.
By W. N. SELIGSBERG,
Of Counsel.

Due and timely service of the foregoing statement of jurisdiction is acknowledged this 13th day of February, 1929.

HAMILTON WARD,
Attorney for defendants Bissell, Fuller, McBurnie, Cook and Woll.

HAMILTON WARD,
Attorney General,
in Person.

JOAB H. BANTON,
District Attorney,
Defendant in Person.

FILED
MAR 20 1929
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1928.

No. 667.

WILLIAM ROSCHEN,

Appellant,

against

HAMILTON WARD, Attorney General of the State of New York; JOAB H. BANTON, District Attorney of New York County, New York, and WILLISTON W. BISSELL, HARLOW M. FULLER, THOMAS McBURNIE, WILLIAM L. COOK and FREDERIC A. WOLL, constituting The Board of Optometry Examiners of the State of New York,

Appellees.

No. 668.

S. S. KRESGE COMPANY,

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against

HAMILTON WARD, Attorney General of the State of New York; JOAB H. BANTON, District Attorney of New York County, New York, and WILLISTON W. BISSELL, HARLOW M. FULLER, THOMAS McBURNIE, WILLIAM L. COOK and FREDERIC A. WOLL, constituting The Board of Optometry Examiners of the State of New York,

Appellees.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANTS

W. N. SELIGSBERG,
I. MAURICE WORMSER,
Counsel for Appellants.

March 18, 1929.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

WILLIAM ROSCHEN, Appellant, against HAMILTON WARD, Attorney General of the State of New York; JOAB H. BANTON, District Attorney of New York County, New York, and WILLISTON W. BISSELL, HARLOW M. FULLER, THOMAS MCBURNIE, WILLIAM L. COOK and FREDERIC A. WOLL, constituting The Board of Optometry Examiners of the State of New York, Appellees.	#667
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APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANTS.

1.

Opinion of the Court Below.

The opinion of the statutory court appears in the record at page 71. It is reported *D. S. Kresge Company* v. *Ottinger*, 29 Fed. (2d) 762.

2.

Jurisdiction.

These are appeals from final decrees of a statutory court in the Southern District of New York entered January 4, 1929, by which the Court denied plaintiffs' motions for preliminary injunction and dismissed the bill of complaint in each case (R., 80).

The suits were filed at about the same time by plaintiffs, for the purpose of procuring injunctions restraining defendants from enforcing the provisions of Chapter 379 of the Laws of New York of 1928, adding a new section, Section 1432-A, to the Education Law of the State of New York.

The suits were originally instituted against Albert Ottinger, Attorney General, and upon the expiration of his term, Hamilton Ward, his successor, was, by consent, substituted (R., 79 and 94). With the exception of the complaints, the cases were heard upon identical papers,—the notice of motion in the *Kresge* case referring to the affidavits submitted in the *Roschen* case (R., 89).

Sec. 266 of the Judicial Code provides for a direct appeal to this Court not only from the denials of interlocutory injunctions but from the dismissals of bills.

3.

Statement of the Case.

The Education Law of New York is a comprehensive statute providing not only for the government and regulation of schools of all grades, public and private, but also providing for the regulation of most of the professions,—Medicine, Dentistry, Pharmacy, Chiropody, Nursing, Veterinary, Science, Engineering and Architecture and,—the particular subject embraced in the suits,—Optometry. The regulations vary in strictness and detail for the different activities and, in most, if not all, cases provide not only for regulation and supervision by Special Boards, but for prosecutions and violations of the law and regulations by the Attorney General (Sec. 1413 Chiropody; Sec. 1362 subd. 12 Pharmacy; Sec. 1339 Veterinary Science; Sec. 1433 Optometry).

The scheme of the law is sensible, placing the burden of examination and adoption of regulations and investigating violations generally on the officers and employees of the appropriate Bureau, and placing the prosecution of violations and the collection of penalties in the hands of the Attorney General.

Article 54 of the Law, consisting of 13 sections, deals with the subject of Optometry. A summary of the more important provisions follows:

The article defines the practice of Optometry as follows (Sec. 1425):

> "A person practices optometry within the meaning of this article who by any means or methods, other than by the use of drugs, diagnoses any optical deficiency or deformity, visual or muscular anomaly of the human eye, or prescribes lenses, prisms or ocular exercises for the correction or relief of the same, or who holds himself out as being able so to do. * * *"

The selling of spectacles and lenses is not the practice of optometry,—nor is it the practice of medicine (Education Law, Sec. 1262).

It provides (Sec. 1426) for a Board of Examiners, gives them power to make rules and regulations not inconsistent with law (Sec. 1427); provides for examinations (Sec. 1428); makes provision for the issuance of degrees in Optometry (Sec. 1429); provides for the issuance of certificates of qualification (Sec. 1428) and for the recording of the same in public offices in the district where the optometrist resides and practices and for display of a certificate at the place of business (Sec. 1430). It provides for the revocation of certificates (Sec. 1432).

It then provides by the additional new section now under attack, as follows:

> "It shall be unlawful for any person, firm or corporation to sell, at retail, as merchandise, in any store or established place of business in the state, any spectacles, eyeglasses, or lenses for the correction of vision, unless a duly licensed physician or duly qualified optometrist, certified under this article, be in charge of and personal attendance at the booth, counter or place, where such articles are sold in such store or established place of business. The peddling of spectacles, eyeglasses or lenses from house to house or on the streets or highways, by a person other than such an optometrist or physician, also shall be unlawful, notwithstanding any law providing for licensing peddlers."

It then forbids the practice of Optometry (Sec. 1433) by unregistered persons, provides against fraud and for the enforcement of the law. It then (Sec. 1434) exempts physicians from the application of the law, and also exempts the sale of toy glasses and certain other kinds of glasses from the operation of the law, exempts the filling of prescriptions from physicians and optometrists, and the duplication of broken lenses from the law. It then provides for the administration of the law under Sec. 51 of the Education Law.

Sec. 51 provides for the regulation of examinations, licensing and practice of the profession by the Regents of the University.

The final section of the Optometry Article contains a saving clause with respect to the unconstitutionality of any part of the law.

With the exception of Sec. 1432-A, which the plaintiffs attack as unconstitutional, the law provides a comprehensive scheme of regulation of the practice of Optometry, that is to say, diagnosis and treatment other than by the use of drugs, of any optical, deficiency or deformity, and the prescription of lenses, prisms or other ocular exercises for the correction of the same.

The new section,—1432-A,—attempts to extend the scope of the law to the *sale* of spectacles as merchandise without diagnosis and without prescription.

The record shows, and it is not disputed, that the plaintiffs are engaged in selling only one type of spectacles, namely, spectacles with convex spherical lenses,—in the language of the street—magnifying glasses.

The plaintiff's papers show, and it is not seriously disputed, that spectacles of this type merely magnify and cannot in any way harm vision. It is true that in the voluminous answering affidavits, many loose statements are made, but there is not in the whole record one reference to a case or one statement by a qualified person, that the use of convex spherical lenses has ever been, or can ever be injurious to human vision.

The plaintiff's position is that under the guise of regulating the practice of a profession, the Legislature has attempted to destroy a useful business, kindred to the profession but in no way purporting to usurp the functions of a professional practitioner. The plaintiffs do not examine eyes; they do not diagnose ailments; they do not prescribe any remedies or cures by way of lenses, spectacles or otherwise (R., 2, 84); they simply sell, over the counter, to their customers spectacles with lenses which help the ordinary changes in vision due to increasing age, and which are not and cannot, under any circumstances, be a detriment to the purchaser.

Nowhere does the law forbid the continued sale of spectacles without examination, diagnosis or prescription. If this law be valid, it is still quite permissible for the plaintiffs, or for registered optometrists or for physicians, to sell spectacles in just exactly the manner in which the plaintiffs have been selling them for years, with the one exception,—that while the physicians and the optometrists may sell these spectacles without restriction, the plaintiffs and other merchants may only sell them *if* a licensed physician or a registered optometrist be in personal attendance and in charge of the place where the sale is made.

Unlike the kindred regulation with respect to pharmacists, the law under discussion does not require the optometrist to be in personal attendance in his place of business and to be personally responsible for the work of his subordinates (Education Law, secs. 1425-36). All the optometrist must do is have his certificate on display (Sec. 1430).

The plaintiffs submit that this section of the Optometry Law is only valid if its enforcement has some reasonable relation to the public welfare; that the portions of the law attacked have no such reasonable relation; that their true purpose is obvious on the face, and that is, to provide employment for optometrists without requiring, directly or by reasonable implication, any service to the public or any benefit to the public as a result of such employment.

In final analysis, the questions in this case resolve down to two, viz:

1. Do magnifying lenses sold by plaintiffs contain any potentiality for harm justifying interference with their free sale?

2. Does the mere presence of a physician or an optometrist in the place at which spectacles are sold serve the public in any way?

Plaintiffs intend to urge the errors assigned in each of the two assignments of error (R., 82, 97).

Summary of the Argument.

1. The magnifying glasses sold by plaintiffs are harmless in themselves and cannot possibly do any injury.

2. Sec. 1432-A of the Education Law makes no requirement for examination of the eye, diagnosis of the ailment, or prescription for remedy or cure when spectacles are sold, and it neither forbids nor imposes any penalty upon the sale of spectacles without such examination, diagnosis or cure.

3. Sec. 1432-A is not reasonably calculated to promote the public health, and has no real and substantial relation to that end.

4. The propriety of granting equitable relief in these cases is clear.

5. The Court below erred in its construction of the statute, and its decision.

6. The Court below erred in its reasons for dismissing the bill as against the defendants other than the Attorney General.

7. The decrees appealed from should be reversed, the preliminary injunctions should be granted, and the cases restored for trial.

POINT 1.

The magnifying glasses sold by plaintiff are harmless in themselves and cannot do any injury.

The complaint in the *Roschen* case alleges in paragraphs 7 and 8 the following (R., 2):

> "7. All of the spectacles sold by plaintiff contain so-called convex spherical lenses, that is, lenses that are merely convex and whose sole aid to vision is that

they magnify what the eye sees. Plaintiff has never sold any spectacles containing other than convex spherical lenses.

8. Plaintiff is advised and believes and alleges that the use of convex spherical lenses in spectacles will not injure the sight. All that convex spherical lenses in spectacles do is to magnify the object at which they are directed, and it is to that extent that they facilitate vision."

The complaint in the *Kresge* case contains similar allegations in paragraphs 9 and 10 (R., 85).

No answers were filed by any of the defendants. So that on this record these allegations stand *admitted*.

The affidavits submitted by plaintiffs substantiate these allegations of their complaints.

Mr. Miller, who has been in the business for over 50 years, states:

"In all my experience of over 50 years in the optical business I have never heard or known of any case in which the use of convex spherical lenses has in any wise harmed the eye or the vision of any person wearing the same, nor can I understand how the use of convex spherical lenses can do any harm. I do understand that some cases of defective vision, near-sightedness or other more serious defects cannot be aided by the use of convex spherical lenses, but that would be obvious to any person suffering from such trouble who tried to use them. They would not aid his vision" (R., 9).

Nor are these allegations substantially disputed by any of the affidavits submitted in opposition to the injunction motions.

Dr. Sullivan, who is Assistant Commissioner of Education (R., 27), is not an optometrist nor a physician (R., 28). He states certain conclusions but without any substantiation.

Mr. Morehouse, who does not state any qualifications except that he is president of an association for the blind (R., 30), states (R., 31):

> "Our association has found, in its experience, that considerable blindness has resulted from the use of improper eyeglasses or spectacles, and that the State ought to exercise its police power to protect the people against blindness and against the unscientific, unethical, and dangerous practice of the manufacture, sale and distribution of eyeglasses or spectacles."

Mr. Morehouse's qualifications do not appear, nor is his statement directed to the kind of spectacles sold by the plaintiffs—convex spherical lenses.

Mr. Henry, who also seems to be a layman, that is, not an optometrist nor a physician, quotes a circular issued by his association (R., 36) urging the avoidance of cheap glasses.

> "Their imperfections may be worse than no glasses at all. Glasses cannot be fitted by mail" (R. 37).
>
> "Eyeglasses cannot be properly fitted by mail or over a merchant's counter."

There is nothing in this affidavit which can be deemed a denial of the allegations in plaintiff's complaint.

Mr. Kiekenapp is an optometrist. His affidavit assumes erroneously to construe the law attacked by these bills as one making an examination, diagnosis and prescription by an optometrist and a physician a prerequisite to a sale of spectacles. He agrees, however, that acceptance of even prescribed glasses is a condition to their utility,—that is, not only must the glasses be scientifically correct but they must satisfy the patient (R., 47). Mr. Kiekenapp's affidavit is long but largely irrelevant because it argues the advantage of scientific examination for the use of spectacles. It does not cite a single instance in his experience nor in the experience of the profession to indicate that anyone was ever injured or could be injured by the use of magnifying glasses.

Mr. Ryer, also an optometrist (R., 52) denies that magnifying glasses magnify (R., 54). Just what this denial means it is impossible to tell because our common experience teaches us that the magnifying lense does magnify; but Mr. Ryer frankly admits that convex lenses may help people to see

better (R., 55), although he says that by the use of convex lenses serious conditions may be overlooked. Mr. Ryer also emphasizes the necessity of subjective tests (R., 57).

Finally and perhaps the best comment on the utility of the business of these plaintiffs is the article published in one of the trade papers before this suit was commenced and a week before the statute in question came into existence (Exhibit C, printed between pp. 22 and 23 of the record). The article was read at the meeting of the Virginia Academy of Optometry by Dr. Frank D. Jackson, and he comments on the fact that the optometrist must not only meet the physical condition but the mental condition of his patient. Dr. Jackson emphasizes the fact that an optometrist's prescription may vary from the exact requirements of the optical condition because it must be acceptable to or tolerated by the patient.

We quote from the article:

> "Sometimes the same accurate prescription that fits the eyes also suits the mind; many times a modification of it must be made, if the patient is to be satisfied. * * * It is, in fact, useless and thankless to fit a 98-cent grade of intelligence with $8 lenses; in fact, from the standpoint of the 98-cent mind, such lenses are a mis-fit; hence the lack of satisfaction. * * *
>
> The accurate and scientific Optometrist may be rejoiced at first—note that I say 'at first'—when he gets a case from the office of the unskilled man and truthfully criticises the accuracy of the previous correction, which probably has not given entire satisfaction, after all. The former feels no hesitancy in saying that he will turn out a more satisfactory fit; he is presuming, of course, that a more accurate refraction will be the more satisfactory. Later, he is dismayed to learn that his nice work is not more satisfactory, and is often less satisfactory than the crude work of his predecessor in the case.
>
> The point may be raised that the accurate correction ought to be also a satisfactory one; it is, in many cases, and in many cases only the most exact of corrections are endurable, and these must be figured down to the eighth diopter in sphere and cylinder, and the half degree of axis—and in weak corrections, too. But these

are not the cases of the 98-cent minds; there's the difference that makes all the difference.

So, to consider optometric success from the business standpoint, the Optometrist must bring to bear a fine discrimination, a delicate balancing of judgment, a measuring of the temperament, an estimation of the personal equation of the patient, that the work may give satisfaction. For an Optometrist indeed feels humiliated if his higher knowledge, his elaborate equipment, his shiny scopes and mometers turn out, after all his care, *a less satisfactory pair of glasses than the patient might have picked out at the 98-cent counter*" (Italics ours).

The figures offered by the plaintiffs as to the extent of the spectacle business in the State of New York are undisputed. Mr. Miller's estimate is that over half a million pairs of spectacles fitted with convex spherical lenses are sold in New York every year over the counter. With this tremendous volume of sales, it is remarkable that neither the expert nor the inexpert affiants whose opinions were submitted to the Court below by any of the parties could cite from all the history of optometry a single instance where anyone had been injured by the use of convex spherical lenses, and the plaintiffs respectfully submit that on this record it must be taken as admitted that convex spherical lenses will not injure the wearer in any manner.

POINT 2.

Section 1432 (a) of the Education Law makes no requirements for examination of the eye, diagnosis of the ailment or prescription for remedy or cure when spectacles are sold and it neither forbids nor imposes any penalty upon the sale of spectacles without such examination, diagnosis or prescription.

A.

GENESIS OF THE LAW.

The statute under attack is a typical product of loose draftsmanship, which implies loose thinking. It deals with the sale of spectacles, eye-glasses and lenses as merchandise at retail. It provides:

> "**Sales of eye-glasses, spectacles and lenses at retail.** It shall be unlawful for any person, firm or corporation to sell, at retail, as merchandise, in any store or established place of business in the state, any spectacles, eye-glasses, or lenses for the correction of vision unless a duly licensed physician or duly qualified optometrist, certified under this article, be in charge of and personal attendance at the booth, counter or place, where such articles are sold in such store or established place of business * * *"

What was the genesis of this law? Literally, we may venture to say it was conceived in iniquity. It was planned at a meeting attended by optometrists, at which was present the attorney for the State Optometric Association,—a member of the New York State Legislature. The committee working with its attorney, the legislator (R., Ex. B—after p. 22),

> "* * * worked unceasingly in the interest of this piece of legislation" (R., *idem*),

but its work was done with secrecy.

> "Every opportunity for strategy was taken advantage of and instead of the usual blowing of trumpets and an out in the open campaign, it was decided that a quiet under tunnel manuevre be employed. * * *" (R., *idem*).

Why was this done so secretly? Because in 1925, this Bill had not only the opposition of the chain stores but *"much professional opposition"* (R., *idem*—italics ours).

These facts are not imagined. They are stated directly, upon the specific authority of the report of the Legislative Committee of the State Optometric Association, reported in the Optometric Weekly, July 5, 1928, page 684, and set forth as Exhibit B to DeYoung's affidavit (R., 13-22).

What did the sponsors of this bill intend to accomplish? They intended to enact

> "a law * * * prohibiting the sale of ready made glasses unless prescribed for the vision of the wearer by those legally qualified to examine eyes."

(See Bulletin of New York Optometric Society, October, 1928, p. 7.)

Such a bill they certainly did not succeed in drafting and in having enacted.

Defendants make it clear by the affidavits which they submit that the law which they would consider helpful to the public is one which requires examination, diagnosis and prescription in connection with the sale of spectacles. Dr. Sullivan says (R., 27) that he "urged the legislature and the governor to exercise the police power of the state to protect people not only from self-imposed injury, but against the unfair and illegitimate marketing of eyeglasses which were ultimately sold without any semblance of scientific or professional approximations or accuracies." Mr. Kiekenapp (R., 41) construes the law to mean that there must be a diagnosis before a sale of spectacles. Mr. Ryer insists (R., 62) that, "Scientific examinations of the human eye are absolutely essential to the protection of the vision of the people of the state."

Defendants' position seems to be that for the purpose of procuring *enforcement* of the law no examination, diagnosis or prescription is imposed upon the seller of spectacles, but that for the purpose of procuring *endorsement* of the law, it must be construed to require such preliminaries to a sale.

Nowhere in Section 1432-a is there a reference, by word or inference, to an examination of eyes, a test of vision, or a prescription for spectacles. Nowhere is there a suggestion that the sale of spectacles must be preceded by examination, test or prescription. All that is required is that at each place where spectacles are sold at retail

> "a duly licensed physician or duly qualified optometrist * * * be in charge of and personal attendance at the booth, counter or place where such articles are sold."

In a word, optometrists and physicians must be given jobs as store managers or countermen at an average expense of at least $50 weekly in each store (DeYoung, R., 22), an expense exceeding plaintiff's profits (R., 4, 87). But the customer can still come in, as before, select his glasses, buy them and pay for them without professional aid, and with perfect legality under the statute.

This was in substance admitted by the learned Assistant Attorney General upon the argument below. He said that the legislature "did *not* intend to restrict the sale and require that the optometrist personally hand every sale over the counter. They *did not* see fit to require that no person shall buy glasses without an examination * * *." (Italics ours.)

B.

The Statute Read in the Light of the New York Cases.

As we have seen, the words of the statute do not require examination, diagnosis or prescription. The next question that arises is, would the courts of New York construe the statute so as to read into it such requirements? Clearly not.

The courts of New York adhere to the rule expressed so well, by Mr. Justice Story (*infra*, p. 19), that it is not for courts of justice to supply the defects or mischiefs of imperfect legislation.

In *Leach* vs. *Aucell*, 154 App. Div. 170, the question was whether there could be an appeal to the Appellate Division, Second Department, from the Appellate Term, Second Department, from its decisions passing on Municipal Court judgment. The argument was made that since such an appeal is permitted in the Appellate Division, First Department, from its Appellate Term, there should also be one in the Second Department. The Court said (p. 176):

> "It is urged that as the Code provides for a second appeal in certain cases in the First Department and omits any provision therefor in the Second Department, this is imperfect legislation, but even so it may be answered in the words of Story, J., in Smith v. Rines (2 Sumn. 338),
>
> > 'It is not for Courts of Justice *proprio marte* to provide for all the defects or mischiefs of imperfect legislation,'
>
> which are cited and approved in Hobbs v. McLean, 117 U. S. 580, 6 Sup. Ct. 870, 29 L. Ed. 940.
>
> We cannot agree with the argument that there can be any application of the doctrine of *casus omissus*, for the rule does not permit the Court to go as far as virtually to make a law. United States v. Union Pacific R. R. Co., 91 U. S. 72-85, 23 L. Ed. 224; Hobbs v. McLean, supra, 117 U. S. 579, 6 Sup. Ct. 870, 29 L. Ed. 940."

In *Furey* vs. *Town of Gravesend*, 104 N. Y., 405, the Court of Appeals said, at page 410:

> "In giving a construction to this act, Courts are confined to the language and terms employed by the legislature, and are not at liberty to interpolate phrases and provisions, although otherwise the purpose and intention, of the law making power may seem indefinite, obscure or incomplete.
>
> If they have failed to insert such provisions in the law as will accomplish the result intended, their omission cannot be remedied by construction, and the law must, to that extent, be considered defective and inoperative."

In *Kennehan* vs. *City*, 162 App. Div. 364, the Second Appellate Division said (p. 365):

> "The case is controlled by the familiar rule of statutory construction that, if the Legislature fails to insert such provisions in the law as will accomplish the result intended, their omission cannot be remedied by construction, and the law must, to that extent, be considered defective and inoperative; the Court having no power to *interpolate* words or phrases. Furey vs. Town of Gravesend, 104 N. Y. 405, 410." (Italics ours.)

The statute makes a violation of the law a *crime* (Education Law, Section 1433), punishable by fine of between fifty and five hundred dollars, or both, and by a penalty of $100 for each offense.

The Courts of New York in such case would certainly refuse to *broaden* the construction of the law in a criminal prosecution.

In *People* vs. *Briggs*, 193 N. Y. 457, the Court of Appeals was dealing with a case in which a milk dealer had marked his milk bottles "Certified Milk, C. M. Briggs, Elma, N. Y.," but had failed to conspicuously mark on the bottles the name of the association certifying, as called for by the statute. The Court held that as the law made no provision for associations to certify milk, the provision of the statute was too vague. The opinion by Judge Haight is very clear (p. 459):

"The only default on the part of the defendant was, therefore, in not having the bottles in which the milk was sold '*conspicuously marked* with the name of the association certifying it.' What is meant by the term 'association'? Did the legislature intend by its use to refer to an association of milk dealers? Evidently not, for the purpose of the entire statute is to place restrictions upon the sale, by dealers, of milk that does not conform to its requirements. Did the legislature intend to refer to some association of doctors, lawyers or ministers? If so, to which? Is it a self-constituted, voluntary association, and if so, who are the persons composing it? It is quite possible that the legislature had in mind some sort of a medical association, but unfortunately it has failed to designate any particular association or individuals composing it, to whom the milk dealer could apply for the certification of his milk. This is a penal statute and a violator is not only liable for penalties but is also liable to be convicted for a misdemeanor, under which he may be punished by both fine and imprisonment. *In construing penal statutes it is not our practice to go beyond the clear meaning and purpose of the statute and we should not attempt to spell out the creation of a new offense which is not clearly indicated by the ordinary meaning of the words used.*" (Italics ours.)

In *People* vs. *Schmidt*, 221 App. Div. 77, the defendant has been convicted of unlawfully possessing a firearm. The defense was that the weapon he had was an air pistol and not a firearm. The Court said (p. 78):

> "The general principle applicable to all questions of construction involved in criminal cases must be followed, that penal statutes must be construed strictly in favor of the defendant."

Some suggestion has been made below that the words "in charge of * * * the booth, counter or place where such articles are sold * * *" require the optometrist or physician to examine and prescribe for prospective purchasers. Of course, to so read the law would be to do more than violence to the language. It presses the bubble till it bursts.

Tompkins v. *Hunter*, 149 N. Y. 117, by Martin, J., at page 122:

> "In construing statutes, it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning."

We have searched the authorities and have discovered but few cases which shed any light on the construction of the expression "in charge of." In the case of

Holliday & Wyon Co. vs. *O'Donnell*,

decided in the Appellate Court of Indiana (44 Ind. App. Ct. 647), it was said by Rabb, P. J. (p. 654):

> "What is to be understood by the phrase, 'a person in charge of defendant's ways, works and machinery,' is by no means clear. A person in charge of ways, works and machinery may or may not have authority to direct workmen, owing entirely to the authority given him by the master. It does not carry the necessary inference that he was so authorized * * *."

See also

Poole vs. *American Linseed Co.*, 119 App. Div. 136

It is to be noted that in both of these cited cases, as in the statute under consideration in this case, the words "in charge of" referred to a place and not to persons, and there is nothing in the statute which makes the optometrist or physician in charge and personal attendance responsible for anything with respect to the sale of spectacles. He is required by the statute to be in charge of a place but not in charge of the personnel and no statutory obligation upon the person in charge could be predicated upon this language, and certainly no obligation which would render the owner amenable under the Penal Law. Further, it is notable that the selling of spec-

tacles is not included in the definition of the practice of optometry as selling medicines is defined as practising pharmacy, so that by this enactment the legislature has attempted to apply to an act not included in the definition of optometry, restrictions applicable only to professional acts.

The pharmacy provisions of the Education Law regulate the *conduct* of those who conduct, carry on or are employed in the retailing of drugs, etc. If that is what the legislature proposed to do with respect to the retailing of spectacles, why did it merely regulate the management of the place where they are to be sold?

Unless our Courts are to change their functions from judicial to legislative, no Court can reasonably read into this law a provision requiring more than the law itself requires, that is, the presence of a licensed person at the place where the sale of spectacles is made without any requirement that such licensed person prescribe or participate in the sale, or even be conscious thereof.

C.

THE STATUTE READ IN THE LIGHT OF THE DECISIONS OF THE FEDERAL COURTS.

Nor is the law as enforced by the Federal Court any different.

The leading case is *Smith* vs. *Rines*, 2 Sumn. 438 (Fed. Case 13,100), by Story, J.:

> "But if the mischief in such a case should be admitted to be irremediable, that is a consideration properly addressing itself to the national legislature to provide suitable means of redress for it. It is not for Courts of justice proprio marte to provide for all the defects or mischiefs of imperfect legislation."

A more recent, but no less forceful statement of the law, is to be found in *Yu Cong Eng.* vs. *Trinidad*, 271 U. S. 500,

involving the validity of the Philippine statute forbidding the keeping of books by merchants in any language other than English, Spanish or a local dialect. Complaint was made by Chinese merchants that they could not use either of these three languages. Some contention was made that the law could be construed as permitting the keeping of additional books in Chinese, though literally it made it "unlawful * * * to keep its account books in any language other than English, Spanish or any local dialect." This Court, by Mr. Chief Justice Taft, said, at page 518:

> "We fully concede that it is the duty of a Court in considering the validity of an act to give it such reasonable construction as can be reached to bring it within the fundamental law. *But it is very clear that amendment may not be substituted for construction, and that a Court may not exercise legislative functions to save the law from conflict with constitutional limitation.*
>
> One of the strongest reasons for not making this law a nose of wax, to be changed from that which the plain language imports, is the fact that it is a *highly penal statute* authorizing sentence of one convicted under it to a fine of not more than 10,000 pesos, or by imprisonment for not more than two years, or both. If we change it to meet the needs suggested by other laws and fiscal regulations and by the supposed general purpose of the legislation, we are creating by construction a vague requirement, and one objectionable in a criminal statute. We are likely thus to trespass on the provision of the Bill of Rights that the accused is entitled to demand the nature and cause of the accusation against him, and to violate the principle that a statute which requires the doing of an act so indefinitely described that men must guess at its meaning, violates due process of law." (Italics ours.)

Denn vs. *Reid*, 10 Pet. (U. S.) 524.

The question in this case was whether an act validating certain deeds proved by subscribing witnesses also validated the deed in question which was acknowledged by the grantor before a judge.

The Court said, by McLean, J., at page 527:

> "This, it must be admitted, when we consider the mischief the law was probably intended to remedy, is a somewhat technical construction of the act; and cases may be found where Courts have construed a statute most liberally to effectuate the remedy, but where the language of the act is explicit, there is great danger in departing from the words used, to give an effect to the law which may be supposed to have been designed by the legislature. Where the language of the act is not clear, and is of doubtful construction, a Court may well look at every part of the statute; at its title, and the mischief intended to be remedied in carrying it into effect. But it is not for the Court to say, where the language of the statute is clear, that it shall be so construed as to embrace cases, because no good reason can be assigned why they were excluded from its provisions."

Hobbs vs. *McLean*, 117 U. S. 567.

Plaintiffs were former partners of the decedent, whose assignee in bankruptcy was defendant. Plaintiffs' testimony was objected to on the ground that it was not admissible under a statute forbidding such testimony in a suit against an executor, administrator or guardian.

The Court held that this statute did not apply to a suit against an assignee in bankruptcy, saying by Woods, J., at page 876:

> "The witnesses admitted by the Circuit Court were not excluded by the terms of this statute. The suit in which they testified was not an action by or against an executor, administrator, or guardian. But the counsel for the plaintiffs insists that the policy of the act applies to suits by or against assignees as well as to suits by or against executors, administrators, or guardians, and that we ought to construe the act so as to include such suits. We cannot concur in this view. The purpose of the act was to remove generally the old incapacity to testify imposed on parties or persons interested in the suit. This was done by a sweeping provision,

subject to certain well defined exceptions, but the exceptions did not include suits by or against assignees in bankruptcy. We cannot insert the exception. *When a provision is left out of a statute, either by design or mistake of the legislature, the Courts have no power to supply it. To do so would be to legislate and not to construe.*" (Italics ours.)

See, also,

U. S. vs. *Shing Shun & Co.*, 173 Fed. 844;
Bate Refrigerating Co. vs. *Sulzberger*, 157 U. S. 1;
Merritt vs. *Welsh*, 104 U. S. 694.

D.

THE MEANING OF SECTION 1432-A AS DERIVED FROM COMPARISON WITH ANALOGOUS STATUTORY PROVISIONS.

As we have seen, this law was passed under such circumstances as to justify the possible inference that it was not fully and frankly discussed. Why, if the legislature intended to make the provision that personal examination and prescription by a licensed physician or a duly qualified optometrist must precede the sale of spectacles, did the Legislature not follow the very simple precedent of another chapter of the Education Law dealing with pharmacists and druggists? Medicines, even harmless medicines, may, with certain statutory exceptions, only be sold in registered pharmacies or drug stores (Education Law, Sec. 1354), and no one may

> "engage in, conduct, carry on or be employed in the * * * retailing of drugs, chemicals, medicines, prescriptions or poisons within this state",

except under the provisions of the law. And the law then, in great detail, shows what may be done by the registered or licensed pharmacist or licensed druggist and the apprentice. The difference in the statutes is most obvious and of vital significance.

It is to be noted that none of the provisions of the Education Law with respect to the various professions, excepting only the Pharmacy Law, refers to the sale of merchandise. The practice of optometry (Section 1425) is defined as follows:

> "A person practices optometry * * * who by any means or methods, other than by the use of drugs, diagnoses any optical deficiency or deformity, visual or muscular anomaly of the human eye, or prescribes lenses, prisms or ocular exercises for the correction or relief of the same, or who holds himself out as being able so to do. * * *."

The Practice of Medicine (Sec. 1250), of Dentistry (Sec. 1300), of Veterinary Medicine (Sec. 1325, subd. 6), and of Chiropody (Sec. 1414), are defined in the same way with respect to diagnosis and treatment.

Only in the case of Pharmacy does the definition of the practice of the profession involve the selling of a product. Education Law, Section 1354:

> "Except as prescribed in this article, it shall not be lawful for any person to practice as a pharmacist, druggist, apprentice or storekeeper, or to engage in, conduct, carry on, or be employed in the dispensing, compounding or retailing of drugs, chemicals, medicines, prescriptions or poisons within this state. * * *."

It is clear, therefore, that in the deliberately planned scheme of the regulation of professions the Legislature did not deem it wise to classify optometry with pharmacy, but rather with medicine, dentistry, veterinary medicine, and chiropody. That which is regulated in each of these cases by the various provisions of the Education Law is the practice of a profession or rendition of a personal service. That which is regulated in the Pharmacy Law is much more the selling of merchandise, and even there the sale of all drugs is not forbidden but the Law expressly permits the unrestricted sale of specifically mentioned drugs and poisons and

of proprietary medicines (Sec. 1361). In the light of the careful and clear modes of expression adopted in other parts of the Law and in this very article on Optometry, can we say that the Legislature by Section 1432-a meant to limit the selling of spectacles to optometrists and registered physicians and to forbid the selling of spectacles except by them? To us it seems clear that the language of Section 1432-a cannot be tortured into such a meaning.

With excellent models before it, the Legislature chose not to say that only registered optometrists or licensed physicians could or should sell spectacles, but merely said that a person of either of these specific classifications must be "somewhere in the offing" whenever spectacles are sold. The statute *nowhere requires* the physician or optometrist to take part in the sale of the spectacles, much less examine the eyes and prescribe.

POINT 3.

Section 1432-a is not reasonably calculated to promote public health and has no real and substantial relation to that end.

Reading the law as it is written, and without gloss or addition or amendment by the Court, it is clearly invalid.

We shall not carry coals to Newcastle by burdening the learned Court with a multitude of citations supporting, explaining and limiting the police power and commenting upon valid statutes enacted in the exercise of the police power and invalid attempts to exercise the power at the expense of the citizen.

A law passed in purported exercise of the police power is valid only if it bears some reasonable and real relation to the protection of the public. The only protection which the legislature could possibly conceive the public needed in the purchase of spectacles would be the *protection resulting from ex-*

amination and prescription. **But, as we have seen, this law does *not* provide for examination and prescription, and, therefore, cannot be valid.**

From the multitude of cases, both in this court and the Court of Appeals of New York, which uphold this *rule of reason*, we briefly quote the following:

> ***Nectow* vs. *City of Cambridge*, 277 U. S. 183, at page 188:**
>
> **"The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare."**
>
> ***Jay Burns Baking Co.* vs. *Bryan*, 264 U. S. 504.**
>
> **By Mr. Justice Butler, at page 513:**
>
> **"Constitutional protection having been invoked, it is the duty of the Court to determine whether the challenged provision has reasonable relation to the protection of purchases of bread against fraud by short weights, and really tends to accomplish the purpose for which it was enacted. * * *."**
>
> **At page 517:**
>
> **"Imposition through short weights readily could have been dealt with in a direct and effective way. For the reasons stated, we conclude that the provision, that the average weights shall not exceed the maximums fixed, is not necessary for the protection of purchasers against imposition and fraud by short weights and is not calculated to effectuate that purpose, and that it subjects bakers and sellers of bread to restrictions which are essentially unreasonable and arbitrary, and is therefore repugnant to the Fourteenth Amendment."**

Louis K. Liggett Co. v. Baldridge, U. S. Sup. Ct., Oct. Term, 1928 (49 Sup. Ct. Rep. 57).

By Mr. Justice Sutherland, at page 59:

"The act is sought to be sustained specifically upon the ground that it is reasonably calculated to promote the public health; and the determination we are called upon to make is whether the act has a real and substantial relation to that end or is a clear and arbitrary invasion of the appellant's property rights guaranteed by the Constitution. * * * The police power may be exerted in the form of state legislation where otherwise the effect may be to invade rights guaranteed by the Fourteenth Amendment only when such legislation bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare. Here the pertinent question is: What is the effect of mere ownership of a drug store in respect of the public health? * * *

In the light of the various requirements of the Pennsylvania statutes, it is made clear, if it were otherwise doubtful, that mere stock ownership in a corporation, owning and operating a drug store, can have no real or substantial relation to the public health; and that the act in question creates an unreasonable and unnecessary restriction upon private business. * * * The claim, that mere ownership of a drug store by one not a pharmacist bears a reasonable relation to the public health, finally rests upon conjecture, unsupported by anything of substance. This is not enough; and it becomes our duty to declare the act assailed to be unconstitutional as in contravention of the due process clause of the Fourteenth Amendment."

Nowhere has the law been better stated than in *People* vs. *Ringe*, 197 N. Y. 143, 149:

"A statute passed pursuant to the police power should be reasonable. Its real purpose must be to protect the public health, morals or general welfare. A statute cannot, under the guise of the police power, but really to affect some purpose not within such power, arbitrarily interfere with a person or a property right. The statute under consideration unnecessarily interferes in several par-

ticulars with that liberty of person and property guaranteed by the Constitution."

In what possible way does the presence of an optometrist or physician at or near a counter where spectacles are sold, or the fact that he is in charge of such a counter, help the public? The sale will be made under this law exactly as it is made today and as described in the two complaints. A customer comes in, uses the test card, selects the spectacles from the sample card, picks out what he wants, pays for it and goes out. How is this process better for public protection if an optometrist be present in the store? He does not examine; he does not prescribe. The law does not require this, and such a requirement cannot be read into it, except by an unwarranted assumption of judicial legislation. Suppose that Roschen in his drug store has an optometrist sitting there all day long. Is it conceivable that under this statute, if one of Roschen's clerks, under such circumstances, sells a pair of spectacles to a purchaser, who simply selects the spectacles, and the purchase and sale are made without the intervention of the optometrist, that any Court would convict Roschen of a violation of the law? He has exactly complied with what the statute requires, and for failing to do something that the proponents of the statute may have wished, but surely did not enact, *he cannot be punished.* Therefore, to require Roschen in his one store, and Kresge in its fifty, to pay an average of $50 a week to an optometrist in order to be able to transact a business of less amount weekly than his salary would be requiring them to do a futile thing so far as the public welfare is concerned, and no Court will permit the legislature to require of citizens the doing of futile things.

Many precedents, interesting because of their facts, are in the law books. We cite a few:

City of Chicago vs. *Netcher*, 183 Ill. 104,

affirming a reversal of the conviction of Netcher, the owner of a department store, for violating an ordinance making it

unlawful for any person doing business where dry goods, clothing, jewelry and drugs are sold, to have exposed for sale or sell meats, fish, butter, etc.

State vs. *Brown*, 37 Wash. 97.

This case held invalid a Washington statute requiring owners of dental parlors to be licensed dentists. See, also:

Buchanan vs. *Warley*, 245 U. S. 60;
Meyer vs. *State of Nebraska*, 262 U. S. 390.

POINT 4.

The propriety of granting equitable relief in these cases is clear.

Upon the Attorney General's motions to dismiss, he argued that there was no equity in the bills and that even though the statute be unconstitutional, plaintiffs should be left to their remedy by defending prosecutions. He also claims that nothing is said in the papers showing irreparable injury.

Let us take up the latter question first. Each complaint shows that the plaintiff will be driven out of this business if the law be enforced because the cost of hiring a physician or optometrist will exceed not only the amount of his profits but the amount of his gross business (R., 6, 88). There are no answers in these cases and the following allegations of the complaint are not denied. In the *Kresge* case (R., 84-85), that plaintiff's sales in the State of New York exceed $20,000 per annum at a direct profit of $5,000 per annum, and the Miller affidavit (R., 10) shows that these spectacles sell at not to exceed $1 a pair at retail. The Kresge complaint further shows that it would not be possible for plaintiff to continue in business if it were required to employ a duly qualified optometrist or physician; that the cost of hiring such a person would be excessive and would exceed plaintiff's gross

income as well as plaintiff's profits from the business (R., 88). The Roschen complaint simply sets forth the facts requisite to give the District Court jurisdiction (R., 2). The complaints also show, and the Court will take judicial notice of the fact, that each sale of spectacles constitutes a misdemeanor, and that, therefore, in violating the law without the protection of an injunction the plaintiffs would subject themselves to *repeated prosecutions* and the Manley affidavit (R., 69) states in so many words that it is the defendants' intention to institute these prosecutions. These allegations sufficiently show the irreparable injury to be suffered by the plaintiffs if they are not protected by the Court. The law is clear that this Court under such circumstances should protect the plaintiffs. In the case of

Tyson vs. *Banton*, 273 U. S. 418,

this Court said at page 427:

> "This suit was brought to enjoin respondents from proceeding either at law or in equity to enforce the last named section, and from revoking plaintiff's license, enforcing by suit or otherwise the penalty of the bond or prosecuting criminally appellant or any of its officers or agents for reselling or attempting to resell any ticket or other evidence of the right of entry to any theatre, etc., at a price in excess of 50 cents in advance of the printed price. The bill alleges threats on the part of appellees to enforce the statute against appellant, to forfeit its license, enforce the penalty of its bond and institute criminal prosecutions against appellant, its officers and agents. It is further alleged that the terms of the statute are so drastic and the penalties for its violation so great (imprisonment for one year or a fine of $250 or both) *that appellant may not resell any ticket or evidence of the right of entry at a price beyond that fixed by the statute even for the purpose of testing the validity of the law, and that appellant will be compelled to submit to the statute whether valid or invalid unless its suit be entertained, and thereby will be deprived of its property and liberty without due process of law and denied the equal protection of the law, in contravention*

of the Fourteenth Amendment to the Federal Constitution. Following the rule frequently announced by this Court, that *'equitable jurisdiction exists to restrain criminal prosecution under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property,'* we sustain the jurisdiction of the District Court. Packard v. Banton, 264 U. S., 140, 143, 44 S. Ct. 257, 68 L. Ed. 596, and cases there cited." (Italics ours.)

See, also,

Truax v. *Raich*, 239 U. S. 33;
Packard v. *Banton*, 264 U. S. 140;
Terrace v. *Thompson*, 263 U. S. 197.

POINT 5.

The Court below erred in its construction of the law and its decision.

The flaw in the reasoning of the learned Statutory Court is easily perceived. It assumes that the New York Act bears a real and substantial relation to the public welfare, when in fact the Act does not even furnish a glimmering possibility of benefitting the public. Instead, it imposes unreasonably burdensome requirements on the appellants, automatically rendering it impossible for them to carry on their businesses. The statute in question was conceived in iniquity. Its real purpose was not to benefit the public but to furnish positions to optometrists. This purpose was cloaked behind the veil of the police power of the State of New York.

This Court recently pierced the protective armor of the police power when it was asserted for an ulterior or selfish purpose. *Foster Fountain Packing Co.* v. *Haydel*, U. S. Sup. Ct. Oct. Term 1928, 49 Sup. Ct. Rep. 1, Advance Sheets of November 1, 1928. In that case a Louisiana statute forbade the export of shrimp from the state unless they had been

shelled. The professed purpose of the statute was to protect the wild life or game of the state. Actually, it did not forbid the export of shelled shrimp from the state, and thus it did not protect anything for residents in the state, except that it ruined shelling plants outside the state and required, if enforced, the establishment of shelling plants within the state. This Court held the Louisiana statute unconstitutional, disregarding the purported object of the statute to conserve wild game for residents of the state, and scrutinizing the actual purpose, which was to require the establishment of shelling plants within the State of Louisiana, to ruin the business of established concerns without the state.

Similarly, in *Adams* v. *Tanner*, 244 U. S. 590, the State of Washington made it unlawful to conduct an employment agency business for a fee. No one doubted that such agencies were subject to proper regulation under the police power of the state, if that power were properly invoked. This Court stated that there was nothing inherently immoral or dangerous to the public welfare in a person acting as the paid representative of another to find a position in which he could earn an honest living.

By the New York Act, the State of New York has made it unlawful and criminal to sell eyeglasses, spectacles and lenses at retail unless a duly licensed physician or duly qualified optometrist be in charge of the booth, counter or place where such articles are sold. It may be that the State might require that the sale of spectacles at retail must be preceded by examination, test or prescription if the use of spectacles is even possibly injurious. We never have denied this power if it were properly exercised, except as to the inherently harmless magnifying lenses. What we have contended in the Court below, and now contend, is that there is no real and substantial relation between the legislation enacted by the State of New York and the public health or welfare, particularly since all the evidence shows the use of certain kinds of spectacles (those sold by plaintiffs) to be useful in most cases and harmful in none.

A state legislature cannot render legislation constitutional by the mere label or denomination that it is for the public welfare, if in fact it is not. The people of the State of New York were not being harmed by the sale of ordinary convex spherical lenses. These are merely magnifying glasses, which cannot and do not injure the sight in any way. On the contrary, the people of the State of New York were being benefitted by the sale of these lenses at a very reasonable price. They will not receive greater care or attention in connection with the purchase of lenses under the provisions of the new Act, than they received before. The duly licensed physician or duly qualified optometrist is not required, under the terms of the statute, to make the sale. The same clerks who have heretofore dealt with the public will continue to make the sales. The physician or optometrist employed need not in any way exert himself, yet his position will be secure, for, by the terms of the statute, the store-owner is required to employ a duly licensed physician or duly qualified optometrist if he is to continue the sale of spectacles.

The words of Mr. Justice McReynolds, in *Adams* v. *Tanner*, *supra*, condemning the Washington statute, find ready application to the present appeal. "Skillfully directed agitation might also bring about apparent condemnation of any one of them by the public. Happily for all, the fundamental guaranties of the Constitution cannot be freely submerged if and whenever some ostensible justification is advanced and the police power invoked" (pp. 594-5).

A statutory provision which is not a legitimate police regulation cannot be made such by being placed in the same Act with a police regulation, or by being enacted under a title that declares a purpose which would be a proper exercise of that power. *Coppage* v. *Kansas*, 236 U. S. 1. As Mr. Justice Grier said, in the *Passenger Cases*, 7 How. (U. S.) 283, at page 458:

> "Its true character cannot be changed by its collocation * * *."

This Court will not hesitate to grasp the real purpose of the legislation (casting aside the professed purpose), which is aimed to further private selfish interest, as this undoubtedly is, and condemn it as unconstitutional. The provisions of the Act do not require that the physician or optometrist make the sales, or examine the purchaser's eyes before permitting a sale to be made. It simply states that he shall be in charge of the booth, counter or place where the articles are sold. His presence alone, or his management of the shop, will not give additional protection to the public, as the sales of mere magnifying glasses (*supra*, Point I) cannot and do not injure the sight in any way. No one was injured under the old course of conducting the sale of spectacles; there was no impending danger of ruining the eyesight of thousands; there was no public demand that optometrists be placed in charge of the selling agencies for ordinary magnifying lenses.

The learned Statutory Court states that it is not disputed "that a more certain and scientific adjustment of spectacles and a more complete correction of poor eyesight may be obtained when the lenses are prescribed and fitted by a registered optometrist than when selected from a mass of different spectacles by the customer himself without any aid." Without questioning this statement of the learned Court, the whole point of the instant case is THAT THE STATUTE IN QUESTION DOES NOT REQUIRE THE OPTOMETRISTS TO MAKE AN EXAMINATION OF THE PURCHASER'S EYES BEFORE A SALE IS MADE. The Statutory Court seems to have quite failed to grasp the point.

The illustrations cited by the Court below, of life preservers, life boats, fire escapes, and rear vision reflectors, to show that there was no necessity for the statute in question to provide specifically that the optometrists must make an examination of the purchaser's eyes before selling lenses, are not in point.

First. It is carrying analogy to absurdity to liken the protection of passengers on steamers, of residents of tene-

ments and of the public on crowded thoroughfares, to the protection of the public from malpractice by unqualified persons in the field of optometry, etc. The ship owner must protect those whom he undertakes to transport; the tenement owner must protect those whom he houses; the automobilist must protect the public against his inherently dangerous machine. And this duty of protection extends far beyond the simple and obvious details noted by the learned Statutory Court. These laws present obvious ways of avoiding danger in emergencies. The butcher, the baker, the grocer, the seller of spectacles must protect his customers against dangerous merchandise; but that does not require the presence of meat or bread inspectors in each shop. Assuming what is quite contrary to the fact,—that there is some inherent or possible danger in every sale of magnifying glasses,—does the presence of the optometrist at the counter avoid this danger? Obviously, no, because the purchaser of the spectacles would have to pay a fee to procure the services of the professional man. The analogy might be closer if the ship owner were permitted to charge for the life preservers; the tenement house owner were permitted to charge admission to the fire escape; or if the chauffeur had to drop a penny or a nickel in a slot before he could adjust the rear vision mirror. It seems an absurdity to try to create an analogy between the rendition of professional service by a human being for a fee and the provision of obvious safeguards free of charge in times of emergency.

Second. We are here construing a *penal* statute and cannot indulge in loose construction.

Third. There is no need to provide that a person on a sinking vessel at sea must use a life preserver or enter a lifeboat as his vessel founders. The recent "*Vestris*" tragedy is sad proof of that. People are generally too anxious and worried to outfit themselves voluntarily with life belts at times of grave danger at sea. Further, *no law* requiring persons in a sea tragedy to use life preservers or lifeboats, or requiring

persons in a burning tenement to use the fire escapes in descending to the street, would be worth enacting. The panic, excitement and disorder accompanying every tragic event, both on land and sea, would override the most carefully drawn act ever prepared. However, such a provision could have been made in the act requiring the physician or optometrist to make an examination of the purchaser's eyes before selling him spectacles, and without such a specific provision the act in question is unconstitutional. This provision would not be rendered nugatory and ineffective by reason of panic, excitement and disorder, because the purchase of a pair of ordinary magnifying lenses is a leisurely transaction.

Fourth. The rear vision reflector illustration. An operator of a vehicle naturally and instinctively uses the rear vision mirror for convenience and for his own protection. If legislation were enacted requiring him to look into it every time he makes a turn, it would be impossible to enforce, and drivers would be very likely to disregard the mandate of the statute. Perhaps legislators realized the uselessness of such a provision and the possible trouble resulting therefrom, and, thinking discretion the better part of valor, enacted the law without mention as to its use. The rear vision mirror saves the operator of the vehicle from turning his head or leaning out the side of his car,—and it is a decided convenience. The driver recognizes its utility, knows what the article is, and makes use of it.

Furthermore, experience has shown the necessity for such equipment to avoid accident,—and by making the reasonable rule of practice a compulsory requirement, the legislature simply established a new statutory criterion of negligent conduct.

The average purchaser of lenses entering a shop is not gifted with a supernatural foresight or insight and intelligence which would enable him to single out from among six or eight salesmen, possibly more or less, the all necessary optometrist. The optometrist has no outwardly distinguishing characteristics. His practical utility in the sale of mere

magnifying lenses, which do not and cannot injure the eyesight, is not conceded, but vigorously disputed.

This Court is familiar, without question, with the distrust in which the public holds optometry. The average person says that he never saw a man consult an optometrist without having glasses prescribed. This distrust may be ill-founded in the public mind, but it is certainly indicative that customers will not flock to the optometrist for counsel and advice when purchasing ordinary magnifying lenses. They will not turn to the optometrist, as the driver of a truck looks to the rear vision mirror, for guidance.

The two Minnesota decisions relied on by the Statutory Court in its opinion are fundamentally different in nature from the present appeal, and no authority whatever, because clearly distinguishable. In *State* v. *Zotalis*, 172 Minn. 132, the first of the two cases, the defendant was convicted of violation of Sec. 5814, G. S. 1923, which prohibited anyone not a registered pharmacist, or a dealer having such a pharmacist in charge of his place of business, from retailing drugs, medicines, or poisons, excepting, however, 23 articles of common use. Defendant ran a confectionery store, was not a pharmacist, and did not employ one. He sold aspirin, and it was proved that aspirin was a drug. On appeal to the Supreme Court of Minnesota his conviction for violation of the statute was affirmed. How does that decision determine the present appeal. The sole question there was whether aspirin was a drug. If it was proved to be, then defendant has violated the statute. The Court specifically stated, at page 766: "It is not questioned that the sale of drugs, medicines or poisons may be regulated in the exercise of the police power". (citing authorities.)

In the case at bar, appellants concede it is the state's right, under its police power, to prescribe an examination of the purchaser's eyes before spectacles which may injure him are sold to him. Such a provision would doubtless serve a useful and beneficial purpose,—someone other than the optometrist would benefit. It would not be a piece of "monopoly" legis-

lation. The optometrist's services would be of some reasonable benefit to the public. Such legislation undoubtedly should be sustained, as it would have some reasonable reference to the public health and welfare. Affirmative duties would be placed upon the optometrist which are *not* imposed in the New York Act. Their absence is fatal to its validity in the eye of the fundamental law.

In *State* v. *Levine*, 173 Minn. 322, the second case cited by the Statutory Court, the Minnesota Court stated (p. 343):

> "Having in view that the SOLE PURPOSE of Sec. 5814 is to prohibit the dispensing of drugs by other than duly registered pharmacists and registered assistants, we think a proper construction to be that a registered pharmacist owner is at all times in charge while during short intervals of the day he is at his meals within easy reach and on call, and the one left in charge of the store does not undertake to sell any drug in his absence." (Emphasis ours.)

The words, "sole purpose," completely distinguish that case from the case at bar. The sole purpose of the New York Act was to create a monopoly for optometrists, to create positions for them, and not to protect the public by examination or prescription. If the sole purpose of the New York Act was to require examination of the purchaser's eyes before sale, then the statute might be sustained, but it does *not* require examination; it does not require that the optometrist make the sale; it merely states that an optometrist "be in charge of and personal attendance at the booth, counter or place where such articles are sold." This being a PENAL STATUTE, words cannot be interpolated by construction, nor can the statute itself be so construed as to widen unnecessarily the language therein.

This Court will therefore pierce through the professed purpose of the New York Act and condemn the real monopolistic purpose which motivated its enactment, in the same manner as it condemned the Louisiana statute in *Foster Fountain Packing Co.* v. *Haydel*, *supra*.

The learned Statutory Court endeavored to point out legal differences between the recent decision of this Court in *Louis K. Liggett Co.* v. *Baldridge*, 49 Sup. Ct. Rep. 57, U. S. Sup. Ct. Oct. Term, 1928, and the case at bar. No effort was made by the lower court to question the soundness, however, of the law laid down in that decision. This Court wrote, two justices dissenting:

> "The police power may be exerted in the form of state legislation where otherwise the effect may be to invade rights guaranteed by the Fourteenth Amendment *only when such legislation bears a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare.*" (Italics ours.)

Under that rule, though the present appeal of course differs from the *Liggett* case on the facts, there is no "real and substantial relation" in this case between the New York Act and the public welfare. There is no reasonably certain correction of the alleged evils, if any, under this Act. There is a faint *possibility* that *perhaps* the public *might* benefit *if* the optometrist conscientiously should undertake an examination of the purchaser's eyes, which he is under *no legal obligation* to do under the preposterous provisions and terms of the New York Act.

POINT 6.

The Court below erred in its reasons for dismissing the bill as against the defendants other than the attorney general.

The bill of complaint in the *Roschen* case alleges that it is the public and official duty of the defendants in this suit to enforce the law (Section 1432-a) and that they threatened to enforce same against this plaintiff and others similarly situated (R., 5). The plaintiff further alleges that the defendant will institute proceedings against him (R., 6). Sim-

ilar allegations appear in the Kresge complaint (R., 88, 89). The defendants have never answered these bills of complaint nor does it appear that these allegations were ever in issue. The learned Statutory Court based its dismissal of the complaint as against all but the Attorney General on those provisions of Section 1433 of the Education Law which place the onus of prosecution upon the Attorney General. They overlooked, however, the last two sentences of the section:—

> "All violations of this act when reported to the department and duly substantiated by affidavits or other satisfactory evidence shall be investigated and if the report is found to be true and the evidence substantiated the department shall report such violations to the attorney-general and request prompt prosecution. The regents may appoint such inspectors as are necessary to be paid from the funds received under this act at such salaries as they may determine for the purpose of the investigation of such violations."

The Court will see that even the preliminary inspection by the inspectors may be irksome and burdensome to the plaintiff, and if the Court finds with the plaintiffs on the larger question, it should afford them relief against those who are actually threatening the injury.

POINT 7.

The decrees appealed from should be reversed, preliminary injunctions should be granted and the cases restored for trial.

March 18, 1929.

W. N. Seligsberg,
I. Maurice Wormser,
Solicitors and of Counsel for
Plaintiffs-Appellants.

Office Supreme Court, U.
FILED
APR 8 1929
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1928.

No. 667.

WILLIAM ROSCHEN,

Appellant,

against

HAMILTON WARD, Attorney General of the State of New York; JOAB H. BANTON, District Attorney of New York County, New York, and WILLISTON W. BISSELL, HARLOW M. FULLER, THOMAS McBURNIE, WILLIAM L. COOK and FREDERIC A. WOLL, constituting The Board of Optometry Examiners of the State of New York,

Appellees.

No. 668.

S. S. KRESGE COMPANY,

Appellant,

against

HAMILTON WARD, Attorney General of the State of New York; JOAB H. BANTON, District Attorney of New York County, New York, and WILLISTON W. BISSELL, HARLOW M. FULLER, THOMAS McBURNIE, WILLIAM L. COOK and FREDERIC A. WOLL, constituting The Board of Optometry Examiners of the State of New York,

Appellees.

REPLY BRIEF FOR APPELLANTS

W. N. SELIGSBERG,
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Counsel for Appellants.

April 5, 1929.

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Supreme Court of the United States.

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WILLIAM ROSCHEN, Appellant, against HAMILTON WARD, Attorney General of the State of New York; JOAB H. BANTON, District Attorney of New York County, New York, and WILLISTON W. BISSELL, HARLOW M. FULLER, THOMAS McBURNIE, WILLIAM L. COOK, and FREDERIC A. WOLL, constituting The Board of Optometry Examiners of the State of New York, Appellees.	No. 657
S. S. KRESGE COMPANY, Appellant, against HAMILTON WARD, Attorney General of the State of New York; JOAB H. BANTON, District Attorney of New York County, New York, and WILLISTON W. BISSELL, HARLOW M. FULLER, THOMAS McBURNIE, WILLIAM L. COOK, and FREDERIC A. WOLL, constituting The Board of Optometry Examiners of the State of New York, Appellees.	No. 668

REPLY BRIEF FOR APPELLANTS.

Answering Appellees' Point I.

Defendants state (p. 9 of their brief) that our point that the lenses are harmless in themselves and cannot possibly

do any injury was not argued or briefed below. It is true that a separate point heading was not made for the argument, but it was clearly part and parcel of plaintiff's case, because it showed that this legislation was *inspired* by selfish interests for selfish purposes, and not for the public welfare, for no harm could come from the use of *mere magnifying lenses.*

Thus at page 5 of our brief in the Statutory Court is found, *in italics*, this statement:

> "Convex spherical lenses are *mere magnifying glasses* (par. 9), *which cannot and do not injure the sight in any way* (par. 10)."

although the rest of the page is printed in ordinary type, without emphasis.

The point was orally argued before the Statutory Court. We quote from the typewritten transcript of the oral argument (p. 5).

> "These plaintiffs sell only one type of spectacle, and that is a spectacle fitted with magnifying glasses of different strength. They do not sell spectacles that will help a far-sighted man or a near sighted man or a man with a diseased eye, and their principal trade comes from the fact that all of us, as we pass forty years, undergo a change in our eyesight which is natural, physiological change in the eyesight and which is called presbyopia or, in plain English, old man's eyes; there is some change in the structure there which requires some assistance, and according to the figures, the vast majority—seventy-five per cent. of the people who wear glasses are simply what they call presbyopes and need nothing but this assistance, because they are not suffering from a disease of the eye, or any diseased condition at all but just from the condition commonly called old man's eyes."
>
> • • • • • • • •

(p. 7).

Judge Hand: Do plain magnifying glasses have any effect upon the human eyes?

> Mr. Seligsberg: According to our report and investigations, we find that they do not."

The foundation laid in the record shows that the harmlessness of the sale and use of mere magnifying lenses stands substantially *uncontradicted*.

The conclusion that this legislation is unconstitutional on these facts is irresistible, for, if the sale and use of mere magnifying lenses is harmless, then the people of the State of New York were not and are not being injured by their use. If the people of the State are not being injured, how can this statute reasonably be said to bear a real and substantial relation to public health and safety? It does not bear such a relation, and it would not bear such a real and substantial relation even if its enactment had been urged by public-spirited organizations instead of parties with sinister motives.

Answering Appellees' Point II.

Assuming that defendants' answer overrides the argument made above,—which is impossible, for the harmless character of mere magnifying lenses is not seriously contested,—defendants concede (p. 10) too much when they agree that Sec. 1432-A of the Education Law does not place upon plaintiffs any duty to precede each sale of spectacles with an examination, test or prescription. Such a concession leaves the statute indefensible, because it bears no real and substantial relation to public health and safety.

In what possible way does the presence of an optometrist or physician at or near a counter where spectacles are sold, or even the fact that he is in general charge of such a counter, help the public? The sale will be made under this absurd law *exactly as it is made to-day* and as described in the two complaints. A customer comes in, uses the test card, selects the spectacles from the sample card, picks out what he wants, pays for it, and goes out. How then does the statute protect the public merely by requiring that an optometrist be present in the store?

Answering Appellees' Point III.

We invite attention to the serious inconsistency in defendants' brief. At page 10 it is stated:

> "If the seller does not provide such expert attendance and supervision he is liable to prosecution. *If he does provide such expert attendance and supervision he is not liable to prosecution, even though the expert makes or permits sales without requiring or suggesting the ordinary preliminary examination*". (Italics ours)

At page 18, defendants, seeking to justify the legislature's failure to place express affirmative duties on the optometrist, state:

> "Here is a peculiar reason, as the legislature may have considered, for supposing that an optometrist, placed in charge of a place where spectacles are sold, *will not remain quiescent* while imperfect goods are offered, while the victim of an obvious diseased condition goes unwarned, or while any goods are offered without the suggestion of an examination". (Italics ours)

Defendants obviously have not decided what the statute requires. Defendants' inconsistency is basic.

To say that this statute serves a purpose akin to those providing for the presence of matrons when female prisoners are searched, or for the presence of representatives of a tax department when a decedent's safe deposit box is opened, or forbidding the driving of automobiles by minors except under specific conditions, is to draw analogy into absurdity (See Appellees' Brief, pp. 15-16). The police matron is present to protect the prisoner and not the public; the tax representative is present to protect the government and no one else. The obvious purpose of the presence of the owner of a car when a minor is driving is undoubtedly to create a rule of civil liability. It is not a safety rule. It is no more safe to have a minor driving in the presence of an adult than to have him driving alone, but statutes of this kind assume that minors driving in certain localities do not endanger public

safety, but that, being minors, a responsibility must be created by the presence of the owner of the automobile.

Another astonishing argument by defendants is the suggestion that defendant, The State Board of Optometry Examiners (Brief, p. 18), will prosecute optometrists who work in stores and permit glasses to be sold without examination. The basis for the prosecution, it is asserted, will be rules which the Regents and the State Board of Optometry Examiners are expected to make for the purpose. Counsel in his commendable zeal forgets that not only in the State of New York but throughout the United States, administrative officers and bodies may only make rules in support of statutory enactments, *and not in amplification thereof*, and consequently his argument fails.

> *United States* v. *Antikamnia Co.*, 231 U. S. 654;
> *United States* v. *Grimaud*, 220 U. S. 506, 518;
> *Maryland Casualty Co.* v. *United States*, 251 U. S. 342.

In *United States* v. *Antikamnia Co.* (*supra*), this Court said, at pages 666-7:

> "The query then occurs, such being the words and purpose, if the quantity or proportion of the substances or any derivative or preparation of them must be stated, is it *administrative of the law or additive to it* to require by regulation that not only the name of the derivative or preparation be stated but from what substance derived or of what it is a preparation?" (Italics ours.)

See also:

> *Hampton* v. *United States*, 276 U. S. 394;
> *United States* v. *United Verde Co.*, 196 U. S. 207;
> *Waite* v. *Macy*, 246 U. S. 606;
> *Williamson* v. *United States*, 207 U. S. 425.

The law in New York is the same.

> *People* v. *Klinck Packing Co.*, 214 N. Y. 121;
> *Schumer* v. *Caplin*, 241 N. Y. 346, 351.

Defendants state (pp. 18-19) that "an optometrist selling glasses without first determining the visual acuity of the sufferer, or at least presenting to him the desirability of such an examination, would be guilty of malpractice". This is a patent confession that appellees fail to grasp the real point in this case, that is,—that the optometrist is *not* required to make the sale of spectacles. True, an optometrist *selling glasses* would have to make an examination to safeguard himself against malpractice suits, but under the statute in question the optometrist is *not required* to make the sale. Anybody, even an errand boy, may do so. Defendants' brief therefore begs the question.

One concluding word as to defendants' brief (p. 17), where they seek to justify the astonishing failure of the legislature to impose express affirmative duties on the optometrist whose employment will be compulsory under this drastic legislation. Defendants' argument is that no express affirmative duties need have been provided in the legislation, because the prohibition of sales at retail of spectacles and lenses for the correction of vision unless a duly licensed physician or duly qualified optometrist is in charge and personal attendance, "introduces a tendency" (p. 17) upon which the legislature might have relied, to expect that purchasers would be afforded expert and professional guidance in the selection of such aids to vision. This "tendency" upon which the legislature may have relied, according to defendants, is predicated upon two grounds: (1) that the optometrist would perform his duties because he has at stake his professional reputation; (2) if he fails to perform his duties his license may be revoked.

Just what these duties are is not stated. Defendants concede (Brief, pp. 10-11) that there is no duty on the part of the optometrist to precede each sale with an examination, test or prescription, and if the optometrist does not do one of these things, it is indeed hard to see just what his functions will be and what he must do to preserve his "professional reputation" or prevent the revocation of his license.

These theories of defendants are unwarranted assumptions, moreover, since we are dealing with a penal statute—where the language must clearly impose a duty, and which must be "strictly construed".

In the last analysis, the entire argument comes down to this: that the legislature of New York may have intended one thing, whereas in truth they accomplished an entirely different thing, by the enactment of the statute in question. It is laudable and proper to enact a statute which is designed really to safeguard and preserve the public health and general welfare, but the statute before the Court bears no real and substantial relation to those worthy purposes. It is conceived and designed not to benefit the public, but to benefit the optometrist. Its genesis is shrouded in iniquity. Its purpose is not to safeguard the public health but to cause optometrists to wax fat with large gains at the expense of the community in general. It bears no more real relation to the public weal than the statutes recently condemned by this Court in the *Liggett* and *Foster Fountain Packing Co.* cases.

For these reasons, together with those advanced in our main brief, the decrees appealed from should be reversed, a preliminary injunction should be granted, and the cases restored for trial.

Respectfully submitted,

W. N. Seligsberg,
I. Maurice Wormser,
Counsel for Appellants.

New York, April 5, 1929.

APR 4 1928
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 667

WILLIAM BOSCHEN,

Appellant,

against

HAMILTON WARD, Attorney General of the State of New York; JOAB H. BANTON, District Attorney of New York County, New York, and WILLISTON W. BISSELL, HARLOW M. FULLER, THOMAS McBURNIE, WILLIAM L. COOK and FREDERICK A. WOLL, constituting the Board of Optometry Examiners of the State of New York,

Appellees.

No. 668

S. S. KRESGE COMPANY,

Appellant,

against

HAMILTON WARD, Attorney General of the State of New York; JOAB H. BANTON, District Attorney of New York County, New York, and WILLISTON W. BISSELL, HARLOW M. FULLER, THOMAS McBURNIE, WILLIAM L. COOK and FREDERICK A. WOLL, constituting the Board of Optometry Examiners of the State of New York,

Appellees.

Appeals from the District Court of the United State for the Southern District of New York.

BRIEF FOR APPELLEES

HAMILTON WARD,
Attorney General of the State of New York,
HENRY S. MANLEY,
Assistant Attorney General,
Counsel for Appellees.

April 1, 1928.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

WILLIAM ROSCHEN, Appellant, *against* HAMILTON WARD, Attorney-General of the State of New York, and others, Appellees.	No. 667
S. S. KRESGE COMPANY, Appellant, *against* HAMILTON WARD, Attorney-General of the State of New York, and others, Appellees.	No. 668

BRIEF FOR APPELLEES

QUESTION

The question presented, is whether chapter 379 of the Laws of New York enacted in 1928, prohibiting the sale at retail of spectacles, eyeglasses and lenses for the correction of vision, unless a licensed physician or optometrist is in charge of and personal attendance at the booth, counter or other place of sale, is in violation of the due process clause of the Fourteenth Amendment of the Federal Constitution.

HOW THE QUESTION ARISES

The two several appellants, each engaged in selling, in New York City, eyeglasses for the correction of vision, and each asserting inability to continue in that business if compelled to comply with the statute (R 4, 6, 87, 88) brought suits against various state officers to enjoin enforcement.

The suits having been heard together, by three judges in accordance with Judicial Code section 266, decision was rendered denying the injunctions and dismissing the complaints. *S. S. Kresge Company* v. *Ottinger*, 29 Fed. 2nd, 762.

Direct appeals were taken to this court, also under provisions of Judicial Code section 266.

THE STATUTE

Sections 1425 to 1436 inclusive of the Education Law, comprising Article 54 of that law, regulate the practice of optometry in the State of New York. The complete Article is printed in the last pages appended to this brief. Section 1432-a, inserted by chapter 379 of 1928, is the section immediately relevant. The same chapter made an appropriate change to section 1434, which had previously provided a saving clause as to persons who neither practice nor profess to practice optometry, and who sell spectacles, eyeglasses or lenses either on prescription, "or as merchandise from permanently located and established places of business."

The legislative intention is not in doubt. The statute is a deliberate assertion of legislative power to regulate the sale of all spectacles, eyeglasses and lenses for the correction of vision.

After September 1, 1928, sales of those articles are regulated in the following particulars:

(a) They may not be "peddled" except by licensed optometrists and physicians.

(b) If an optometrist makes a sale (*quaere*, as to this) away from his office he must deliver to the customer a bill of purchase containing certain information. (Sec. 1430, last paragraph.)

(c) They must not be sold in any store or established place of business unless a licensed physician or optometrist, "be in charge of and personal attendance at," the place of business.

(d) These restrictions do not apply to persons who sell only on prescriptions, or who duplicate broken lenses.

(e) These restrictions do not apply to sales of toy glasses, goggles with plain lenses, or ordinary colored glasses.

SUMMARY OF ARGUMENT

In an endeavor to make our brief more directly responsive to that submitted on behalf of appellants, we shall take it up, point by point, under the following headings:

1. The sale of eyeglasses and lenses for the correction of vision is a matter so related to public health that regulation of such sales is within the police power. This includes the magnifying glasses sold by plaintiffs. The tendered issue that those are harmless in themselves and cannot possibly do any injury, is an issue not argued below, and is a conclusion not justified upon the present record or upon appeal to common knowledge.

2. We agree, that section 1432-a of the Education Law does not place upon these appellants any duty to precede each sale with an examination, test or prescription.

3. The statute is reasonably calculated to promote the public health, and has a real and substantial relation to that end.

4. The propriety of granting equitable relief in these cases is not clear.

5. The Court below correctly construed the statute, and did not err in its decision.

6. The Court below did not err in its reasons for dismissing the bills as against the defendants other than the Attorney-General.

7. The decrees below should be affirmed.

POINT I

The sale of eyeglasses and lenses for the correction of vision is a matter so related to public health that regulation of such sales is within the police power.

We suppose it to be unquestioned that optometry is within the police power.

State ex rel. Hallen v. *Board of Examiners*, 37 Utah 339, 108 Pac. 347 (Sup. Ct. Utah; Apr. 2, 1910).

McNaughton v. *Johnson*, 242 U. S. 344 (Jan. 8, 1917).

Price v. *State*, 168 Wis. 603, 171 N. W. 77 (Sup. Ct. Wis.; Mar. 4, 1919).

Ex parte Rust, 181 Cal. 73, 183 Pac. 548 (Sup. Ct. Calif.; Aug. 25, 1919).

Baker v. *State*, 91 Tex. Cr. Ap. Rep. 521, 240 S. W. 924 (Ct. of Cr. Appeals; June 1, 1921).

Commonwealth v. *Houtenbrink*, 235 Mass. 320, 126 N. E. 669 (Sup. Jud. Ct. Mass.; Mar. 30, 1926).

Harris v. *Board of Examiners*, 287 Pa. 531, 135 Atl. 237 (Sup. Ct. Pa.; Nov. 22, 1926).

Saunders v. *Swann*, 155 Ten. 310, 292 S. W. 458 (Sup. Ct. Ten.; Apr. 9, 1927).

The Supreme Court of Illinois held to the contrary in 1917 (*People* v. *Griffith*, 280 Ill. 18, 117 N. E. 195) but that decision has several times been questioned, and seems not to have impaired the force of an optometry act subsequently enacted in 1919 in that state. A Georgia statute was held unconstitutional, but upon narrow, and doubtful, grounds. (*Mott* v. *Board of Examiners*, 148 Ga. 55, 95 S. E. 869).

That the same public interest extends to the sale of eyeglasses and lenses for the correction of vision, whether the customer makes the selection entirely unassisted, or by the simple devices afforded by these appellants (R 2, 84), seems clear. If the State may properly regulate the fitting of eyes by experts, it has no less reason to regulate the fitting of eyes by persons without skill. In this matter the argument for regulating what is done for others, applies even for regulating what the individual does for himself. If such support is needed, the answering affidavits in the present record confirm the statements made in *Price* v. *State*, *supra*:

> "There are many ailments that are attributable to defective eyesight, which disappear when the vision is corrected by properly

fitted glasses. To properly diagnose and prescribe for the particular defect from which the patient is suffering requires a knowledge of the anatomy of the eye as well as the subject of physical optics . . . We are further informed that glasses which satisfy the patient are frequently improper, and that glasses which at the time do not seem comfortable should be insisted upon."

The selling of eyeglasses is far from being all of optometry, but it is probably the most characteristic transaction of the profession. It is the transaction which the statutes are most concerned to safeguard. The legislature of every state in the Union has, in some degree, recognized that the inexpert cannot with safety select their own eyeglasses. (See the digest of statutory provision, appended.) Several States forbid the giving of eyeglasses as a premium upon the sale of books, magazines or other goods, unless an expert examination is also provided. Many enact that eyeglasses may not be sold by peddlers, or that they may be sold only from permanent places of business. Such provisions have been sustained. (*Saunders* v. *Swann, supra; Harris* v. *Board of Examiners, supra.*)

In some States the sale of ophthalmic lenses, particularly the duplication or replacing of such a lens, can be done only upon prescriptions. See: California, Florida, Idaho, Montana, Texas, Utah and West Virginia.

Massachusetts goes to the full length of limiting to the licensed class all sales of eyeglasses for the correction of vision. The constitutionality of that statute has been upheld by a lower court.

(*Commonwealth* v. *S. S. Kresge Company*, Superior Court for Transaction of Criminal Business before Fosdick, J., Dec. 20, 1928; appeal to Supreme Judicial Court allowed Feb. 5, 1929.) Apparently Kansas, Pennsylvania and Rhode Island go to the same length in regulating sales.

Alabama and Tennessee have statutes quite similar to the one now under review. "Branch" offices of an optometrist in Pennsylvania must be "in charge of" a licensed optometrist.

This body of legislation, and the judicial decisions cited, are not without weight when the reasonable relation to public health, of sales of eyeglasses and lenses, is challenged.

The magnifying eyeglasses sold by these plaintiffs are quite within the scope of that legislation, and we have no occasion to consider the relations to the present problem of the doctrine of *Purity Extract Co.* v. *Lynch*, 226 U. S. 192.

We note that appellants now devote a point to the proposition that these lenses are harmless in themselves and cannot possibly do any injury. Although the moving affidavits seem to have provided a foundation for it, which we were at some trouble to meet in our answering affidavits, our recollection is that this issue was not argued or briefed below. See R. 74, bottom of page; and see page 33 of appellants' present brief.

However that may be, there is expert evidence in the present record contradicting the proposition. (R. 38, 39, 48, 49, 50, 52, 53, 54, 65, 66, 67.)

It is also noted that the proposition, if true, is not necessarily relevant. A useless article, even though harmless in itself, cannot be harmless when it is allowed to take and to keep the place

of a useful one. This argument might find a very forceful illustration when the improperly fitted person ventures into traffic, whether as pedestrian or motorist.

POINT II

We agree, that Section 1432-A of the Education Law does not place upon these appellants any duty to precede each sale with an examination, test or prescription.

We have no quarrel with the principal theme of pages 14 to 23 inclusive of appellants' present brief. Substantially this same point was in our brief below, and before that we had taken the same position in oral argument. (See appellants' present brief, page 14.)

We make no argument for judicial amendment of this statute; on the contrary we submit that the Legislature has set forth in unmistakable language just what it requires of these appellants and all other retailers of spectacles and lenses for the correction of vision. That is, that they do not sell unless they provide that:

> "a duly licensed physician or duly qualified optometrist, certified under this article, be in charge of and personal attendance at the booth, counter or place, where such articles are sold in such store or established place of business."

If the seller does not provide such expert attendance and supervision he is liable to prosecution. If he does provide such expert attendance and supervision he is not liable to prosecution, even though the expert makes or permits sales

without requiring or suggesting the ordinary preliminary examination.

Whether the statute, so construed, provides an adequate and reasonable regulation, is quite another question, to be considered under the next point.

There is another question of construction which may have a word here. That is the minor question, whether the physician or optometrist, placed in charge of the booth, counter or place, will be in charge of additional personnel making sales there. We submit that such control is quite clearly implied in control of the place; that control of the place for the purposes evidently in view cannot very well exist without control of personnel, if the statute is to receive a reasonable and teleological interpretation. See *United States* v. *Alford*, 274 U. S. 264, 267:

> "We regard the meaning as too plain to be shaken by the suggestion that criminal statutes are to be construed strictly. They also are to be construed with common sense."

A Minnesota statute provides as follows:

> "No person shall hereafter carry on, conduct, or transact business under a name which contains as a part thereof, the words, drugs, drug store, or pharmacy * * * unless the place of business so conducted be at all times in charge of a registered pharmacist, or during the temporary absence of such registered pharmacist, in charge of a registered assistant pharmacist."

The Supreme Court of Minnesota seems not to have doubted that the "charge" intended by the statute is over the "business" as well as the

"place." See *State* v. *Zotalis*, 172 Minn. 132, 214 N. W. 766; *State* v. *Levine*, 173 Minn. 322, 217 N. W. 342.

As to the Pennsylvania statute forbidding an optometrist from opening a branch office unless each such branch office, "is in charge of a regularly licensed optometrist," the court may have spoken somewhat loosely (*Harris* v. *Board of Examiners, supra*) when it said:

> "If it is desired to engage in business on a large scale, and cover different places with his license, he must either make the examination personally with the necessary instruments or have it done in the same way by a registered optometrist."

We have not seen fit to make that assumption concerning our statute, but we can rely upon this Pennsylvania dictum as supporting our proposition that an optometrist put in charge of a booth, counter or other place where eyeglasses and lenses are sold, has conferred upon him powers and responsibilities other than those characteristic of a janitor.

POINT III

The statute is reasonably calculated to promote the public health, and has a real and substantial relation to that end.

A legislature, in its exercise of the police power, has the burden of determining whether a specific danger to public welfare exists, and what measure is reasonably suited to averting that danger. The courts will not lightly disturb a legislative determination upon either question.

It is usually said that if the correctness of the determination is even debatable, and not clearly

arbitrary, it will be undisturbed. (*Purity Extract Co.* v. *Lynch*, 226 U. S. 192, 201–202, 204, 205; *Patsone* v. *Pennsylvania*, 232 U. S. 138, 144; *Price* v. *Illinois*, 238 U. S. 446, 452, 453; *Hebe Co.* v. *Shaw*, 248 U. S. 297, 303; *Euclid* v. *Ambler Co.*, 272 U. S. 365, 388; *Graves* v. *Minesota*, 272 U. S. 425, 428; *Ohio ex rel. Clarke* v. *Deckeback*, 274 U. S. 392, 397.) Whether this court always adheres, in practice, to that rule, has been a matter of difference within the court in some cases where legislative determinations have been overturned. (*Adams* v. *Tanner*, 244 U. S. 590, Brandeis, Holmes and Clarke, JJ., dissenting; *Burns Baking Co.* v. *Bryan*, 264 U. S. 504, Brandeis and Holmes, JJ., dissenting; *Weaver* v. *Palmer Bros.*, 270 U. S. 402, Holmes, Brandeis and Stone, JJ., dissenting; *Tyson & Brother* v. *Banton*, 273 U. S. 418, Holmes, Brandeis, Stone and Sanford, JJ., dissenting; *Liggett Co.* v. *Baldridge*, 278 U. S. 105, Holmes and Brandeis, JJ., dissenting.) Whatever differences there may be in practice, apparently all members of the court concede some allegiance to the rule stated in the first group of cases.

Not only is a legislature entitled to a presumption in favor of the wisdom of its determinations, it is entitled to a presumption that it has acted in good faith. At least it is not for the court to act as a conscience to the legislature. (*Fletcher* v. *Peck*, 10 U. S. 87, 130–131; *Matter of Burns*, 155 N. Y. 23, 26–27; *State* v. *Foutch*, 155 Ten. 476, 295 S. W. 469, 471.)

A legislature, having first determined that the unrestricted sale of spectacles and lenses for correction of vision constitutes a danger to the public

welfare, has next the responsibility of applying an appropriate safeguard, and can exercise some discretion in its choice of means.

No legislature, so far as we know, has ever seen fit to withhold spectacles from all persons unless they submit to preliminary examinations. Such an exercise of the police power would not be more drastic than a compulsory vaccination law, and in these days of dangerous traffic could be justified by the needs of all, including persons of perfect vision. We do not understand that appellants question the validity of such a statute; indeed, their argument suggests that no other form of statute can be valid.

Less drastic than the method mentioned above, but going just a little further than our own statute, is the Massachusetts law dealing with the same dangers. It forbids retail sales of spectacles and lenses for correcting defective vision, unless by physicians or optometrists or upon prescription.

The Massachusetts statute, and those of Kansas, Pennsylvania and Rhode Island, while not making the express provision that examination precede all sales of eyeglasses for correction of vision, doubtless tend strongly to that result, by forbidding sales except by optometrists and physicians and upon their prescriptions. Seven states make similar provision as to ophthalmic lenses, not sold as ready-to-wear spectacles, and particularly when sold for duplication or replacement.

It would seem that the New York statute, and the similar statutes of Alabama and Tennessee, and the branch office provision of Pennsylvania, all placing a licensed optometrist, or physician,

in charge of the place where eyeglasses and lenses are sold, have the same tendency, in equal force. The distinction, if any, resides in the fact that in Massachusetts the sale of eyeglasses for correction of vision is entrusted directly to the optometrist, while in New York the merchant may sell, provided he places an optometrist, "in charge of and personal attendant at," the booth, counter or place of sale.

The probable results of a statutory provision are a factor in its evaluation. (*Wuchter* v. *Pizzutti*, 276 U. S. 13.) The legislature, choosing a means for averting a particular danger, is not limited to such means as will certainly accomplish that desired result. Legislatures, like individuals dealing with their every day problems, may be satisfied by tendencies and probabilities.

An ordinance requiring a police matron to be present at the examination of a female prisoner, although prescribing no particular duties for the matron, is reasonable legislation of obvious tendency. So of the provision that a representative of the tax department be present when the safety deposit box of a decedent is opened; or that a minor shall not drive an automobile except accompanied by the owner. The legislature doubtless acted wisely and tended to the public safety when it required railroads to provide watchmen at crossings. That much accomplished, the railroad would fix their duties so as to promote public safety and avoid damage claims. The same observation holds true for the full crew bills; the railroads being required to have a certain number of employees upon a train could be trusted to prescribe their duties and see that they did not ride idly up and down the line.

The aptness of these, or similar, analogies is challenged at pages 33 to 35 of appellants' brief. It is said that the presence (we use that word only because appellants do) of the optometrist at the counter has no tendency to avoid any danger there may be in the sale of inexpertly fitted spectacles, "because the purchaser of the spectacles would have to pay a fee to procure the services of the professional man." That reason involves several unjustified assumptions, most notably that the compensation, of the optometrist put in charge of a place where eyeglasses are sold, must necessarily come in the form of a separate fee from each customer who elects to be examined.

Pharmacists, under a similar statutory requirement, have a different and less obtrusive financial arrangement. Many states, perhaps all, require that a place where drugs are sold be in charge of a licensed pharmacist. The Minnesota statute has already been quoted, and two decisions under it cited. One of the reasons given by the majority in this court, in *Liggett Co.* v. *Baldridge, supra*, why the Pennsylvania statute regulating ownership of drug stores was unreasonable, was that the same public interest supposed to be involved was sufficiently protected by other statutory provisions, among them that no one but a registered pharmacist lawfully may have charge of a drug-store.

This same argument now made here, that the statute is void because it does not go far enough, was before this court in *Rissling* v. *Milwaukee*, 271 U. S. 644 Mem., affirming *City of Milwaukee* v. *Rissling*, 184 Wis. 517, 199 N. W. 61. That ordinance required electricians to be licensed, and regulated their work and its inspection. It pro-

vided that no license should be granted to any person, firm or corporation unless there was somebody connected with him or it, either as co-partner, stockholder or employee, who had obtained six years' practical experience upon electrical work, and, "who shall be the supervisor of all work done by the licensee." Before this court the plaintiff in error urged in his brief (pp. 18–22) that the ordinance did not insure supervision, it would merely put firms on their honor to supply it, etc. Respondent answered in its brief (pp. 7–10) that the provisions for revocation of a license, not only for the licensee's own non-compliances but for any improper work done under his supervision, made the ordinance effective and proper.

We submit that the present statute, prohibiting sales at retail of spectacles and lenses for the correction of vision, unless a duly licensed physician or duly qualified optometrist is in charge and personal attendance, introduces a tendency upon which the legislature may rely, not unreasonably, to expect that purchasers will be afforded expert and professional guidance in the selection of such aids to vision.

There is an additional reason why the legislature may rely upon this tendency, in the case of physicians and optometrists. Not only is the interest of the employer involved, as in the case of the crossing watchman and the train crew, but the professional man himself has particular reasons for making his skill available to purchasers. He has at stake not only a professional reputation, but his license. Education Law, sec. 1432, provides:

> "The department shall have power to revoke any certificate of registration * * * the holder of which is * * * grossly incompetent to practice optometry."

The Regents are authorized to supervise the practising of medicine and optometry. (Education Law, secs. 51, 1416.) They make rules for that purpose, to the full extent of their statutory power, explicit and implied. Here is a peculiar reason, as the legislature may have considered, for supposing that an optometrist, placed in charge of a place where spectacles are sold, will not remain quiescent while imperfect goods are offered, while the victim of an obvious diseased condition goes unwarned, or while any goods are offered without the suggestion of an examination.

We are informed that under the practice which has grown up, the State Board of Optometrical Examiners hear all complaints lodged against members of the profession and after such hearing make a recommendation to the Education Department as to the punishment appropriate, including the recommendation of revocation of license. It is exceedingly improbable that a professional individual would completely fail to function in a professional manner when placed in charge of the selling of spectacles and lenses without subjecting himself to the action of the Board of Examiners and a revocation of his license by the Education Department. To sell a pair of spectacles without first examining the patient is comparable to a physician writing a prescription without ever having looked at the sick person. Certainly such physician would be guilty of gross incompetency and malpractice. An optometrist

selling glasses without first determining the visual acuity of the sufferer, or at least presenting to him the desirability of such an examination, would be guilty of malpractice. He would be subject, as a result of the relation in which the present statute has placed him to the sale, not only to the endangering of his license, but also to a civil suit for malpractice.

The statute, although not prescribing the professional services to be performed in connection with each sale, may be supposed, not without some reason, to tend to the safeguarding of vision. The statute is reasonably calculated to promote the public health, and has a real and substantial relation to that end.

POINT IV

The propriety of granting equitable relief in these cases is not clear.

Considering the constitutionality of the statute as an open question, newly presented, should the court even consider upon the present facts an application for injunction against the Attorney General? Exceptions may be so numerous as to eclipse the rule, nevertheless:

> "The general rule is that equity will not interfere to prevent the enforcement of a criminal statute even though unconstitutional." (*Hygrade Provision Co.* v. *Sherman*, 266 U. S. 497, 500.)

Unless that has become an empty phrase, only uttered in cases decided upon some other principle, there remain limits to the protection the federal courts will throw about a citizen who engages in a controversy with his state as to the consti-

tutional validity of its legislation. Are the present cases so very appealing?

Is there any good reaon why these appellants should not make an effort to comply with the present statute while contesting its validity?

These appellants could defend themselves upon one violation, meanwhile obeying the statute. True, they would suffer a loss, and if the statute is unconstitutional this is a hardship we should not wish to impose. Yet we should face the fact that on the other side there is a corresponding possibility of wrong to the people of the State of New York. Where is the balance of convenience in the particular case?

Compliance with the statute, while defending upon one violation, may mean to Roschen, whose sales are small (in the original complaint stated to be about 120 pairs of spectacles annually, for about $300; compare, R 2) ~~this may mean~~ that he must retire from this particular line of business, or sell on prescription only. Possibly he can make some arrangement for part time services of an optometrist. But even if he must retire from this very small line of business entirely, pending his eventual triumph in his litigation, and thereby suffer a good will loss, which he does not claim or evaluate, should he and the similar dealers, concerning whom we have scanty information, be allowed to balance that slight and temporary personal inconvenience against the public interest which, according to the legislative determination, calls out for redress?

As for the richer corporate appellant, its moving papers afford no reason to suppose that it cannot make the temporary adjustment required by compliance with the statute pending final ad-

judication. It alleges as a conclusion (R 87), but does not support with details, that its present margin of profit is too slight to hire an optometrist, and it makes no form of assertion that its customers would not willingly absorb the added cost to them of professional service.

POINT V

The court below correctly construed the statute, and did not err in its decision.

We have nothing to add to what we have said concerning this topic. The opinion below shows careful consideration; its errors, if any, are fundamental and not of inadvertence.

POINT VI

The court below did not err in its reasons for dismissing the bills as against the defendants other than the Attorney General.

The allegation in the bills, as to the public and official duties of the District Attorney and the Board of Optometry Examiners, are mere conclusions of law, and they require no answer except that afforded by the statutes.

The Statutory Court, if it overlooked the sentences now quoted by appellants (brief, page 39), overlooked nothing of importance. If appellants believe a court could be moved to enjoin mere "preliminary inspection," they should have made defendants the Regents, or the inspectors.

We have appeared throughout for the Board. By special request of Joab H. Banton, the defendant District Attorney, and of his assistant, Mr. Benvenga, we represent all the defendants upon the present appeals, and move for affirmance.

POINT VII

The decrees below should be affirmed.

Respectfully submitted,

HAMILTON WARD,

Attorney General of the State of New York, Solicitor for Appellees.

Brief by

HENRY S. MANLEY,

Assistant Attorney General.

DIGEST OF STATUTES OF FORTY-EIGHT STATES REGULATING SALES OF SPECTACLES, EYE-GLASSES AND LENSES

The following digest has been somewhat hastily prepared, and some errors may have crept into it.

Many of the books of statutes consulted did not include statutory changes made in 1928 and 1929. In general, this digest is correct as of January 1, 1928.

A great many of the statutes commence with a definition, to the general effect that the practice of optometry is the measurement of visual acuity by any means whatever, sometimes specifying various means, and conclude with a saving clause, to the general effect that the foregoing provisions do not apply to physicians or surgeons, or to sales of eye-glasses upon prescription, or to sales of eye-glasses as merchandise. Obviously, there is considerable room for construction in determining whether eye-glasses are sold, "as merchandise," when even the simplest testing apparatus is used or made available. It is impossible, in this digest, to take notice of the small differences of language upon which such questions of construction may depend.

In general, we speak in this digest of all provisions, such as are mentioned above as a "saving clause," under that term, although in some cases a different descriptive word, such as "exception," might be more appropriate.

We do not note, in this digest, saving clauses applicable to physicians and surgeons or to sales upon prescription. We do not note prohibitions

of "peddling," when accompanied by a saving clause limited to sales from a permanent place of business.

Even where quotes are not used, the significant phrases are usually copied verbatim.

Alabama

Saving clause as to resident merchants who sell eye-glasses or spectacles as merchandise in permanently established places of business, who do not use or attempt to use, or permit to be used, a trial case or test cards, nor employ mechanical means to determine the accommodative or refractive status of the eye. Alabama Code of 1928, section 2893, provides:

> "*Store where glasses are sold; how department conducted.*—Nothing in this article shall be so construed as to prevent any person, firm, or corporation from owning or operating a store or business establishment wherein eyes are examined or glasses fitted; provided, that such store, establishment or optometric department shall be in charge of a duly licensed optometrist, whose name must appear on and in all optometry advertising of whatsoever nature done by said person, firm or corporation."

Arizona

Saving clause as to sale of spectacles and eye-glasses as merchandise from a permanently established place of business.

Arkansas

Saving clause in favor of persons who sell spectacles and lenses as merchandise from regularly established places of business. Also complete exception in favor of Civil War veterans.

California

Saving clause in favor of sale of complete ready-to-wear spectacles and eye-glasses as merchandise, by person not holding himself out as competent to make examinations. Dispensing, replacing or duplication of an ophthalmic lens or lenses without a prescription is forbidden.

Colorado

Saving clause as to persons who neither practice nor profess to practice optometry and who sell spectacles as articles of merchandise.

Connecticut

Saving clause as to dealers in spectacles or eye-glasses who neither profess to practice nor practice optometry.

Delaware

Saving clause as to one who sells spectacles or eye-glasses in the ordinary course of trade and who does not attempt to use trial case or employ mechanical means for examination.

Florida

Saving clause, with qualifications, as to sale, as merchandise, of sun or shade glasses with plain lenses. Also as to sale and replacement of spectacles and eye-glasses by person with regularly established place of business who has been in that business in the State for ten years. Unlawful for persons other than optometrists, physicians and surgeons to use in any manner any trial lenses, trial frames, test charts, etc., or to sell or replace precision lenses except upon prescriptions.

Georgia

Saving clause as to persons selling glasses as article of merchandise, or using test cards in

connection with such sales, at a permanently located place in the State, when not trafficking or attempting to traffic upon assumed skill in optometry.

Idaho

Saving clause as to persons, firms or corporations who deal in eye-glasses in a store or other permanently established place of business, who neither practice nor profess to practice optometry, who do not use in testing of the eye any lenses other than those actually sold, and who do not give or offer eye-glasses as premiums. Only an optometrist or oculist shall accept or offer to accept for duplication an ophthalmic lens or prism.

Illinois

Saving clause as to persons, firms and corporations who deal in eye-glasses or spectacles in a store or other permanently established place of business and who neither practice nor attempt to practice optometry.

Indiana

Saving clause as to resident merchants, so long as they sell spectacles as any other piece of merchandise, without representation of or qualification on the part of the seller.

Iowa

Saving clause as to merchants or dealers who sell glasses as merchandise in an established place of business and who do not practice or profess to practice optometry, which practice includes allowing public to use any mechanical device for measurement of vision.

Kansas

Practice of optometry defined to include adopting of lenses to human eye for any purpose, either directly or indirectly. It is forbidden for unlicensed persons in any manner to barter or give away any eye-glasses, spectacles, lenses or frames.

Kentucky

Saving clause as to persons who sell spectacles and lenses only as merchandise in a duly established mercantile establishment.

Louisiana

Saving clause as to retail dealers selling glasses as merchandise in their established places of business licensed by the State.

Maine

Saving clause as to resident merchants so long as they sell spectacles as any other piece of merchandise without representation of qualification in the practice of optometry on the part of the seller.

Maryland

Saving clause as to those who sell spectacles or lenses as merchandise, provided they do not practice optometry, which practice includes allowing use of instruments, test cards, test lenses, etc.

Massachusetts

Makes liable to fine and imprisonment any person, not licensed, who practices optomery, "or sells or attempts to sell spectacles, eye-glasses or lenses for the purpose of correcting defective vision." These provisions shall not apply to physicians or surgeons, or persons who do not

practice nor profess to practice optometry but who sell spectacles, eye-glasses or lenses on prescription, "or as merchandise from permanently located and established places of business when not sold for the purpose of correcting defective vision."

Michigan

Saving clause as to persons selling glasses as an article of merchandise and not trafficking or attempting to traffic upon assumed skill.

Minnesota

Unlawful for glasses to be vended as merchandise except from a permanently located and established place of business. Person displaying sign such as an eye, or employing any means for measuring vision or adapting lenses, or having testing appliances in his possession, deemed to be engaged in practice of optometry.

Mississippi

Saving clause as to merchants and druggists who are actually engaged in business in the State. These may sell and assist purchasers in fitting spectacles in their places of business at time of sale.

Missouri

Saving clause as to persons, firms and corporations who deal in eye-glasses or spectacles in a store or other permanently established place of business.

Montana

Saving clause as to persons who sell spectacles without attempting to traffic upon assumed skill in adapting them to the eye, but this may not

protect those who replace or duplicate ophthalmic lenses, or who use for testing lenses other than those actually sold.

Nebraska

Saving clause as to permanently located dealers in spectacles or eye-glasses who neither practice nor profess to practice optometry.

Nevada

Saving clause as to persons who merely sell spectacles, eye-glasses or lenses as merchandise.

New Hampshire

Saving clause as to persons who neither practice nor profess to practice optometry but who sell spectacles, eye-glasses or lenses as merchandise from permanently located and established places of business.

New Jersey

Saving clause as to persons who neither practice nor profess to practice optometry, and who sell spectacles, eye-glasses or lenses as merchandise from permanently located and established places of business.

New Mexico

Saving clause as to persons who sell spectacles or eye-glasses in the ordinary course of trade, and who do not attempt to employ subjective and objective mechanical means to determine the accommodative and refractive states of the eye.

New York

(See statute, printed in full.)

North Carolina

Saving clause as to persons who sell spectacles, eye-glasses or lenses as merchandise from per-

corporation." (Shannon's Code, sec. 3654 a 11, last paragraph, added by L. 1925, ch. 99, sec. 3.)

No optometrist may open and maintain branch offices in more than three counties. Eye-glasses or spectacles must not be peddled from door to door, nor given as a premium with books, magazines or other goods, unless the vision is to be tested and the glasses fitted without charge by an optometrist, etc.

Texas

Saving clause as to persons who sell spectacles and eye-glasses as merchandise; meaning merchants who do not practice optometry, or offer to practice optometry, but who sell spectacles or eye-glasses after they have been selected by their customers alone without aid from the merchant, either in person or indirectly, or by the provision of any mechanical or eye-testing machine or self-testing machine, etc., other than the particular and complete and ready-to-wear spectacles or eye-glasses selected by the customer in person from trays or other containers; and any other method of sale or delivery shall be construed as practicing optometry.

Utah

Saving clause as to persons, firms or corporations who sell eye-glasses or spectacles as articles of merchandise, provided they do so in the ordinary course of trade from permanently located and established places of business, do not traffic or attempt to traffic upon assumed skill in testing the eye and adapting lenses thereto, do not duplicate or replace lenses (exclusive wholesale optical

establishments, however, may do so), do not use in the testing of eyes lenses other than those actually sold, and do not give or offer to give eye-glasses or spectacles as premiums.

Vermont

Saving clause as to resident merchants who sell ready made spectacles or eye-glasses as merchandise in permanently established places of business and who do not use nor permit to be used a trial set of lenses, trial frames, test charts, etc., to aid or assist a customer in the selection of glasses or spectacles.

Virginia

Saving clause as to persons who sell spectacles, eye-glasses or lenses as merchandise from a permanently located and established place of business.

Washington

Saving clause as to persons who, in regular course of trade, sell or offer for sale spectacles or eye-glasses as regular merchandise without pretense of adapting them to the eyes of the purchaser, and not in evasion of this act. Giving away eye-glasses, spectacles, lenses or frames as premiums is forbidden.

West Virginia

Saving clause as to persons, firms or corporations who deal in eye-glasses or spectacles in a store or other permanently established place of business, and who neither practice nor attempt to practice optometry. Optometry includes the replacement or duplication of an ophthalmic lens except upon prescription.

Wisconsin

Saving clause as to sale of spectacles only at an established place of business without attempting to test the eyes, but the furnishing, using or employment of any means, device or machine, designed or calculated to aid any person in the selection or fitting of spectacles or eye-glasses, etc., shall constitute the practice of optometry.

Wyoming

Saving clause as to persons who sell spectacles, eye-glasses or lenses as merchandise from permanently located and established places of business, but who neither practice nor profess to practice optometry, nor advertise or hold themselves out as qualified to fit or adjust any lenses or lens as an aid to human eyesight.

SUMMARY

1. Five states expressly forbid giving away eye-glasses and spectacles as premiums: *Idaho, Kansas, Tennessee, Utah, Washington.*

2. Eleven states have a saving clause as to sales "as merchandise," and without the express restriction that the sale be from a "permanent place of business": *California* (merchant must not hold himself out as competent to make examinations, nor shall he dispense an ophthalmic lens except upon prescription), *Colorado, Connecticut, Delaware, Michigan, Montana* (must not use trial lenses), *Nevada, New Mexico, Ohio, Texas* (merchant must not provide testing devices), *Washington.*

3. Thirty states have a saving clause as to sales "as merchandise" and from a "permanent place of business": *Arizona, Arkansas, Florida* (mer-

chant must have been in that business in the State for ten years, and must not use testing devices), *Georgia* (must not use test cards), *Idaho* (merchant must not use trial lenses or duplicate ophthalmic lens without prescription), *Illinois, Indiana, Iowa* (must not allow use of testing device), *Kentucky, Louisiana, Maine, Maryland* (must not use testing devices), *Minnesota* (must not even possess testing devices), *Mississippi* (express provision that merchant or druggist may assist purchasers in fitting spectacles), *Missouri, Nebraska, New Hampshire, New Jersey, North Carolina, North Dakota, Oklahoma* (merchant must not furnish self-testing devices), *Oregon, South Carolina* (must not use trial lenses), *South Dakota, Utah* (must not use trial lenses), *Vermont* (must not use, or permit to be used, testing devices), *Virginia, West Virginia* (merchant must not replace or duplicate an ophthalmic lens without prescription), *Wisconsin* (merchant must not furnish or use any testing device), *Wyoming*.

4. Seven states have no saving clause as to sales "as merchandise," or have such a saving clause accompanied by other express provisions clearly regulating all sales of spectacles and eyeglasses for correction of defective vision in which selection and adaptation are involved: *Alabama, New York, Tennessee* (these three have provisions that an optometric store or department must be placed "in charge of" a licensed optometrist, etc.), *Kansas, Massachusetts, Pennsylvania, Rhode Island*.

EDUCATION LAW

of the State of New York

ARTICLE 54

OPTOMETRY

[*As amended to the close of legislation, 1938*]

Section 1425. Definition; application of article.
1426. State board of examiners.
1427. Powers of board.
1428. Examinations; certificates of practitioners.
1429. Degrees.
1430. Certificates to be recorded and displayed.
1431. Fees.
1432-a. Sales of eyeglasses, spectacles and lenses at retail.
1432. Revocation of certificate.
1433. Violations of article.
1434. Construction of article.
1435. Department supervision.
1436. Validity.

§ 1432. **Definition; application of article.** A person practices optometry within the meaning of this article who by any means or methods, other than by the use of drugs, diagnoses any optical deficiency or deformity, visual or muscular anomaly of the human eye, or prescribes lenses, prisms or ocular exercises for the correction or relief of the same, or who holds himself out as being able so to do. As used in this article, "regents" means the board of regents and "department" means the education department of the state of New York.

§ 1426. **State board of examiners.** The board of examiners in optometry is continued. The members of said board now in office shall continue in office until the expiration of their respective terms. Such board of examiners shall consist of five persons appointed by the regents, and shall possess sufficient knowledge of theoretical and practical optics to practice optometry and shall have been residents of this state actually engaged in the practice of optometry for at least five years. The term of each member of said board shall be five years, or until his successor is appointed, and vacancies shall be filled for the unexpired term only.

§ 1427. **Powers of board.** Said board of examiners shall, subject to the approval of the department, make such rules and regulations, not inconsistent with the law, as may be necessary for the proper performance of its duties. Any member of the board may, upon being duly designated by the board, or a majority thereof, administer oaths or take testimony concerning any matter within the jurisdiction of the board.

§ 1428. **Examinations; certificates of practitioners.** Every person desiring to commence or to continue the practice of optometry after January first, nineteen hundred and nine, except as hereinafter provided, upon presentation of satisfactory evidence, verified by oath, that he is more than twenty-one years of age, of good moral character, has a preliminary education equivalent to at least two years in a registered high school, and after January first, nineteen hundred and twenty, has graduated from a high school having a four-

year course and registered heretofore by the board of regents or hereafter by the department as maintaining a satisfactory standing, or an education accepted by the department as a full equivalent, and after receiving such preliminary education has prior to January first, nineteen hundred and thirty, graduated from a school of optometry having a course of not less than two years and maintaining a standard satisfactory to the department, and after January first, nineteen hundred and thirty, has graduated from a school of optometry conducted as a department of a university registered by the board of regents with either the degree of bachelor of arts or that of bachelor of science and a certificate of graduation in optometry, shall take an examination before the board of examiners to determine his qualifications. Every candidate successfully passing such examination shall be registered by the department as possessing the qualifications required by this article and shall receive from said department a certificate thereof.

Applicants nineteen years of age certified as having satisfactorily completed the first two years of a four-year course of optometry in an optometry school registered as maintaining at the time a satisfactory standard, may be admitted conditionally to the examination in such subjects as are prescribed to be complete with such two years.

Any person who shall submit to said board of examiners satisfactory proof as to his character, competency, and qualifications, and that he has been continuously engaged in the practice of optometry in this state for more than two years next prior to the time that chapter four hundred and

sixty of the laws of nineteen hundred and eight took effect, may upon the recommendation of said board of examiners receive from the department a certificate of exemption from such examination, which certificate shall be registered and entitle him to practice optometry under this article. Every person who was, on the twenty-first day of May, nineteen hundred and eight, when section two hundred and nine-b of the public health law, as then known, took effect, entitled to a certificate of exemption as therein provided, but who failed or neglected to make application therefor and present evidence to entitle him thereto, on or before January first, nineteen hundred and nine, as provided by said section, must make such application and present such evidence on or before July first, nineteen hundred and nine, or he shall be deemed to have waived his right to such certificate. If any person whose registration is not legal or who is not registered because of some error, misunderstanding or unintentional omission, shall submit to the state board of examiners in optometry, or to the department, satisfactory proof that he had all the requirements prescribed by law at the time required for registration and was entitled to be legally registered, he may, on unanimous recommendation of the state board of examiners in optometry, or by action of the department, receive from the department under seal a certificate of the facts which may be registered by any county clerk and shall make valid the previous imperfect registration and such certificate shall include the date on which such person could or should have registered, and his registration shall be deemed to have been valid and cor-

rected from that date. Before any certificate is issued it shall be numbered and recorded in a book kept in the office of the department and its number shall be noted upon the certificate. A photograph of the person registered shall be filed with the record and a duplicate thereof affixed to the certificate. In all legal proceedings the record and photograph so kept in the office of the department, or certified copies thereof, shall be prima facie evidence of the facts therein stated.

For the purpose of changing the status of an optometrist licensed by exemption to that of one licensed by examination, the department may admit to examination any optometrist duly licensed by exemption, who in lieu of the preliminary and professional requirements prescribed, presents satisfactory evidence that he has continuously and in conformity to law practiced optometry in the state of New York for a period of not less than ten years.

No person shall de deemed eligible to make application for a certificate of exemption or a certificate of fact after January first, nineteen hundred and twenty-three.

Upon the recommendation of the board, the department may also without the examination herein provided, endorse a certificate to practise optometry in any other state or country granted after examination by a legally constituted board of examiners in optometry upon payment of the statutory fee by the applicant and provided that his preliminary and professional education shall have been not less than those required by this state, and provided that he shall have been in reputable practice continuously for not less

than five years immediately next preceding his application.

§ 1429. **Degrees.** No degrees in optometry shall be conferred in this state except the degrees of doctor of optometry (Opt. D.) or doctor of optical science (D. O. S.).

The doctor of optometry and doctor of optical science degrees shall not be conferred upon any person who has not received either a bachelor of arts degree or a bachelor of science degree, accompanied in either case with a certificate of graduation in optometry, and who has not thereafter completed a course of two years' graduate study of the subject of optics and optometry.

Nothing in this article shall affect the standing of any degrees in optometry conferred prior to the amendment of this act.

§ 1430. **Certificates to be recorded and displayed.** Every person to whom a certificate of either registration or exemption shall be issued shall immediately cause the case to be recorded in the clerk's office in the county of his residence, and also in the clerk's office of each other county wherein he shall then practice or thereafter commence the practice of optometry and no registration in a county clerk's office thereafter shall be necessary. Every person practicing optometry shall annually in the month of June report under oath to the state board of examiners any facts required by the board, shall pay to the department a registration fee of two dollars and shall receive a certificate of registration which must be conspicuously displayed together with his original certificate of registration or exemption

in a conspicuous place in the principal office wherein he practices optometry and, whenever required, exhibit such certificate to said board of examiners or its authorized representatives.

Before the first day of June of each year the secretary of the board shall mail to every optometrist registered in the state of New York a blank application for reregistration, addressing he same in accordance with the post office address given at the last previous registration. Upon receipt of such application blank, which shall contain space for the insertion of his name, office and post office address, date and number of his license, and such other information as the department may deem necessary, he shall sign and forward this statement and application for renewal of his registration certificate to the secretary of the board, together with a fee of two dollars. Upon receipt of such application and fee, and having verified the accuracy of the same by comparison with the applicant's initial registration statements, the secretary of the board shall issue a certificate of registration which shall render the holder thereof a legal practitioner of optometry for the ensuing year.

These certificates of registration shall all bear date of July first of the year of issue, and shall expire on the thirtieth day of June in the year following. Application for registration therefor must be made during the month of June of each year, and if not so made an additional fee of one dollar for each thirty days of delay beyond the first day of July and up to the first day of January, shall be added to the regular fee. On the first day of October of each year, or within ten days thereafter, the secretary of the board shall publish and

mail to every registered optometrist in the state of New York a printed list of the legally registered optometrists within the state, and each published list shall contain at the beginning thereof these words: "Each registered optometrist receiving this list is requested to report to the secretary of the board the name and address of any persons known to be practicing optometry, whose names do not appear in this registry. The names of persons giving such information shall not be divulged." If any optometrist continues to practice optometry without registration as herein provided his license may be suspended or revoked by the department, in accordance with the provisions of this section. If any practitioner of optometry should fail to register in time for the appearance of his name in the published list of registered optometrists, in accordance with the provisions of this act, the department shall notify said delinquent to appear before them at an appointed time and place, and if his explanation of his failure to have registered shall be satisfactory, he may be reinstated and his name added to the registry; and the department may remit the additional fees accruing because of delay in registering. But should the delinquent's explanation prove unsatisfactory, the department may suspend the person from the practice of optometry for a limited season or may revoke the person's license.

Any optometrist who has been heretofore duly licensed and registered to practice in this state whose license shall not have been revoked or suspended, and who either before or after reregistration as required by this section as hereby

amended, shall have temporarily abandoned the practice of optometry or removed from the state, may reregister within this state, upon complying with the provisions of this section for reregistration, and also filing with the secretary of the board his affidavit of such facts.

Whenever practicing said profession of optometry outside of, or away from, said office or place of business, he shall deliver to each customer or person so fitted with glasses, a bill of purchase, which shall contain his signature, home, post office address, and the number of his certificate of registration or exemption, together with a specification of the lenses furnished and the price charged therefor.

§ 1431. **Fees.** The fee for such examination shall be fifteen dollars; for a certificate of registration, ten dollars; for a certificate of exemption, five dollars; for annual registration, two dollars; for any certificate of fact required of a student apprentice, one dollar; and all fees and fines required or imposed by the provisions of such article or rules shall be paid to the department and constitute a fund for expenses made necessary by this article. All fees, fines and penalties shall be paid into the state treasury and the legislature shall annually appropriate therefrom for the education department an amount sufficient to pay all proper expenses incurred pursuant to this article. The fee to be paid to the county clerk for recording an original certificate shall be fifty cents.

§ 1432. **Revocation of certificate.** The department shall have power to revoke any certificate

of registration or exemption granted by it under this article, the holder of which is guilty of any fraud, deceit or misrepresentation in his practice or in his advertising, has been convicted of crime, or is an habitual drunkard, or grossly incompetent to practice optometry. Proceedings for revocation of a certificate or the annulment of registration shall be begun by filing a written charge or charges against the accused. These charges may be preferred by any person or corporation, or the department may prefer said charges. Said charges shall be filed with the department, and a copy thereof filed with the secretary of the board of optometry examiners. The board of optometry examiners, when charges are preferred, shall designate three of their number as a committee to hear and determine said charges. A time and place for the hearing of said charges shall be fixed by said committee as soon as convenient, and a copy of the charges, together with a notice of the time and place when they will be heard and determined, shall be served upon the accused or his counsel, at least ten days before the date actually fixed for said hearing. Where personal service or service upon counsel can not be affected, and such fact is certified on oath by any person duly authorized to make legal service, the department shall cause to be published for at least seven times for at least twenty days prior to the hearing, in two daily papers in the county in which the optometrist was last known to practice, a notice to the effect that at a definite time and place a hearing will be had for the purpose of hearing charges against the optometrist upon an application to revoke his certificate. At said hearing the accused shall have the right to cross examine the wit-

nesses against him and to produce witnesses in his defense, and to appear personally or by counsel. The said committee shall make a written report of its findings and recommendations, to be signed by all its members, and the same shall be forthwith transmitted to the department. If the said committee shall unanimously find that said charges, or any of them, are sustained, and shall unanimously recommend that the certificate of the accused be revoked or his registration annulled, the department may thereupon revoke said certificate or annul said registration, or do both. If the department shall annul such registration, it shall forthwith transmit to the clerk of the county or counties in which said accused is registered as an optometrist, a certificate under its seal certifying that such registration has been annulled, and said clerk shall, upon receipt of said certificate, file the same and forthwith mark said registration "annulled." Any person who shall practice optometry after his registration has been marked "annulled" shall be deemed to have practiced optometry without registration. Where the certificate of any person has been revoked, or his registration has been annulled as herein provided, the department may, after the expiration of one year, entertain an application for a new certificate, in like manner as original applications for certificates are entertained; and upon such new application they may in their discretion exempt the applicant from the necessity of undergoing any examination.

§ 1432-a. **Sales of eyeglasses, spectacles and lenses at retail.** It shall be unlawful for any person, firm or corporation to sell, at retail, as mer-

chandise, in any store or established place of business in the state, any spectacles, eyeglasses, or lenses for the correction of vision, unless a duly licensed physician or duly qualified optometrist, certified under this article, be in charge of and personal attendance at the booth, counter or place, where such articles are sold in such store or established place of business. The peddling of spectacles, eyeglasses or lenses from house to house or on the streets or highways, by a person other than such an optometrist or physician, also shall be unlawful, notwithstanding any law providing for licensing peddlers.

§ 1433. **Violations of article.** No person not a holder of a certificate of registration or exemption duly issued to him and recorded as above provided shall after January first, nineteen hundred and nine, practice optometry within this state. No person shall falsely personate a registered optometrist of a like or different name, nor buy, sell, or fraudulently obtain a certificate of registration or exemption issued to another, or advertise the practice of optometry in violation of rules to be made by the department. Practicing or offering to practice optometry, or the public representation of being qualified to practice the same by any person not authorized to practice optometry, shall be sufficient evidence of a violation of this article. And the holder of a certificate of registration or exemption practicing optometry, and having one or more places of business shall be equally liable for violations of this article by any apprentices or unlicensed employees. No person practicing or offering to practice optometry shall publicly represent himself to be a doctor, or shall assume the title of doctor or use such title or any abbrevia-

tion thereof in his practice, unless the right to use the same has been conferred upon him by some duly authorized college or university, prior to the taking effect of this act. Any violation of the provisions of this article shall be a misdemeanor and courts of special sessions shall have jurisdiction of all such violations, and any person violating any of the provisions of this article or any rule of the department relating to the practice of optometry and not inconsistent with the law shall be guilty of a misdemeanor and shall on conviction thereof be punished for a first offense by a fine of not less than fifty dollars nor more than two hundred and fifty dollars, or by imprisonment for not more than three months, or by both such fine and imprisonment, and for a second or subsequent offense by a fine of not less than two hundred and fifty dollars nor more than five hundred dollars, or by imprisonment for not more than six months, or by both such fine and imprisonment. Each act constituting a violation of this article shall be deemed to be a separate act, and the person guilty thereof shall be subject to a penalty of one hundred dollars for each such act. A right of action for the recovery of a penalty under this act may be settled or compromised by the attorney-general, either before or after proceedings are brought to recover such penalty and prior to the entry of judgment therefor. The penalties hereby imposed for a violation of the provisions of this article shall not in any way affect the liability of a person to punishment for a violation of this article upon prosecution therefor in a court of criminal jurisdiction. All prosecutions under this act shall be made by the attorney-general in the name of the people of the state and all fines and penalties shall be paid to the board and such pen-

alties may be sued for and recovered in the name of the people of the state in an action brought therefor by the attorney-general. All violations of this act when reported to the department and duly substantiated by affidavit or other satisfactory evidence shall be investigated and if the report is found to be true and the evidence substantiated the department shall report such violations to the attorney-general and request prompt prosecution. The regents may appoint such inspectors as are necessary to be paid from the funds received under this act at such salaries as they may determine for the purpose of the investigation of such violations.

§ 1434. **Construction of article.** Nothing in this article shall be construed to apply to duly licensed physicians authorized to practice medicine under the laws of the state of New York nor to the sale of toy glasses, goggles consisting of plano white or plano colored lenses or ordinary colored glasses, nor to persons who sell spectacles, eyeglasses or lenses only on prescription from such physicians or from such duly qualified optometrists, or who duplicate broken lenses.

§ 1435. **Department supervision.** The provisions of this article shall be administered subject to the provisions of section fifty-one of this chapter.

§ 1436. **Validity.** If any section of this article, or any part thereof, shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder or any other section or part thereof.